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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1923.

No. 627
UNITED STATES OF AMERICA *et al., Appellants,*
v.
THE NEW RIVER COMPANY *et al., Appellees.*

No. 628
SLAB FORK COAL COMPANY *et al., Appellants,*
v.
THE NEW RIVER COMPANY *et al., Appellees.*

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA.

BRIEF FOR APPELLEES IN NO. 627 AND NO. 628

STATEMENT OF THE CASE.

This is an appeal from a decree in favor of the appellees, The New River Company et al., granting them injunctive relief against an alleged denial to them of legal rights to transportation by The Chesapeake & Ohio Railway Company and The Virginian Railway Company through the promulgation of a rule as to

the furnishing of cars for transportation, known as Rule 4. As this rule was promulgated by the railroads solely in compliance with and pursuant to a decision and order of the Interstate Commerce Commission, the complainants joined as respondents the United States of America and the Interstate Commerce Commission and requested the assembling of a three judge court for the hearing of the cause under the provisions of Act of Oct. 22, 1913, c. 32 (38 Stat. 220; Compiled Stats., §998).

The complainants alleged in their bill (Rec., p. 11,* Section XV of the bill) that

> "Acting under and because of said decision, order and ruling of the Commission of December 11, 1922, and as your complainants are informed and believe and therefore allege, in fear and duress of the penalties imposed by law in case of violation of any decisions, orders or rulings which the Commission is authorized to make, the carriers, defendant herein, have put in force, and notified your complainants that they have put in force Rule 4 of Circular CS-31 Revised, effective in the case of The Chesapeake and Ohio Railway Company on February 10, 1923, and in the case of The Virginian Railway Company on February 1, 1923."

and the railway defendants, The Chesapeake & Ohio Railway Company and The Virginian Railway Company, respectively, set forth in their answers (Rec., p. 54 and p. 49);

In the Chesapeake & Ohio answer (Rec., p. 54):

* Page reference herein, unless otherwise specified, is to the printed record in Case 628.

"The orders issued by the Commission in the cases of New River Company et al. v. the 'Chesapeake' and 'Virginian,' supra, expressly made the report containing findings of fact and conclusions thereon a part thereof, and while negative in form was necessarily treated by respondent as affirmative in substance and character. The decision in the Bell & Zoller case, supra, which was expressly made part of the order, did two things, first, it condemned the Illinois rule as published by respondent, and, second, it approved Rule 4 of Circular C. S.-31 (Revised). Because of the reparation provisions of the Interstate Commerce Act, the effect upon respondent of the order was necessarily precisely the same as though the order had been in the affirmative form, requiring respondents to cease and desist publishing and observing the Illinois rule and in lieu thereof to publish and observe Rule 4 of Circular C. S.-31 (Revised).

"Facing as it did the danger of having to successfully defend suits for heavy damages, believed to approximate as much as $5,000.00 per day, supported by a decision and by reparation orders of the Commission, which it is believed would have automatically followed the failure of respondent to have observed the rule prescribed by the Commission in the Bell & Zoller case, supra. Respondent, after due notice to complainant, undertook to cancel the joint mine rule published in Supplement No. 1 to Circular C. S.-31 (Revised) through the issuance of Supplement No. 3 to Circular C. S.-31 (Revised), effective February 10, 1923, copy of which is attached, marked "Appendix No. 2," thereby on that date undertaking to restore Rule 4 as published in Circular C. S.-31 (Revised), as shown in Appendix A of 1911 Bill of Complaint."

In the Virginian answer (Rec., p. 49):

> "And for further answer to said Bill of Complaint this respondent says that in the matter of the distribution of its supply of coal cars to the mines of the complainants, and other coal mines on its lines of railroad, it is subject to the orders, rules, and decisions, of the Interstate Commerce Commission; that the Interstate Commerce Commission having, in its said decision in the Bell & Zoller case, decided that said Rule 4 of Circular C. S.-31, Revised, is not in principle unreasonable or unduly prejudicial, and in the same decision having expressly reversed its conclusions in the Fairmont case and distinguished the Illinois case, this respondent considers that it was legally bound to put into effect on its railroad said Rule 4, of Circular C. S.-31, Revised, in the distribution of its supply of cars to the coal mines on its line."

The United States of America and the Interstate Commerce Commission relied solely on motions to dismiss based chiefly on the contention that no affirmative order had been made or entered by the Commission and submitted their case on these motions, waiving any right to answer. The case is before this court on appeals by the United States of America and the Interstate Commerce Commission from the denial of these motions to dismiss by the granting to the complainants of the relief prayed for and also on an appeal by the Slab Fork Coal Company et al., shippers of coal by the defendant railway companies, who, deeming themselves benefitted by the action of the railways and Interstate Commerce Commission, intervened as defendants and filed motions to dismiss and answers to the bill. The appeal of the Slab Fork Coal

Company et al. goes both to the denial of their motions to dismiss and to the decree on the merits.

There is no disagreement as to the facts of the case. The issues are solely on two questions of law, first, on procedure, whether the action taken by the Interstate Commerce Commission was such that the denial of transportation by the railways was pursuant to an order of the Commission so that the United States and the Commission were required to be joined and were properly joined as parties defendant and the case heard by a three-judge court; and, second, on the merits, as to whether the complainants were unlawfully deprived of a right of transportation to which they were entitled.

APPELLEES' CONTENTIONS.

Briefly stated, the contention of the appellees is that they have a legal right to their fair share of the car supply of each carrier serving their joint mines; that accordingly, in periods of car shortage, they may on any day offer the prospective output of the mine to either carrier and are entitled to their share of such cars as that carrier has available based on that offer; that, if the cars so secured, leave in their hands, not accepted for shipment, any portion of the rated output of the mine, they may offer that remaining tonnage to the second carrier; and that on that offer to the second carrier they are entitled to the fair share of such cars as that carrier has available.

The appellees asserted in the Court below, and here assert, that their legal rights to contract for transportation as thus defined are supported by legal principles and cannot be taken away or abridged in any

manner or form by the carriers or the Commission. It has been asserted from the outset of these proceedings, upon authority of cases hereinafter cited:

1. That the rights to transportation for which appellees contend and which have been taken away and denied to them by the aforesaid decision of the Commission are guaranteed by the Constitution of the United States.

2. That the carriers defendants below are, by Rule 4 and the decision of the Commission aforesaid, denied the full use of their property for the purposes for which it was dedicated to the public use, in violation of the Constitution.

3. That Rule 4, and the decision of the Commission aforesaid, require, direct and authorize the carriers to depart from the fundamental obligation of their calling each to serve indifferently and without discrimination or preference all persons offering freight for shipment.

That this obligation is several and not joint.

4. That the orders for cars placed by the joint shipper with one carrier do not foreclose his right to call upon the other carriers for a proportionate share of their equipment in which to load the shipments rejected by the first carrier.

5. That Section 22 of the Interstate Commerce Act guarantees to shippers the same rights against the carriers that they had at common law, and the sections of the law giving the Commission authority over the distribution of coal cars give it no greater powers to limit the rights of shippers in the use of equipment than it has when the commodity transported is other than coal.

Section 22 of the Interstate Commerce Act, paragraph (1), 24 Stat. L., 379.

Section 1 of the Interstate Commerce Act, paragraphs (10)-(14), 40 Stat. L., 476.

6. That Rule 4 could not have been legally put into effect by the carriers:

(a) Because it precludes the joint-mine owner, who has offered his output to carrier "A" and had a portion only of his output taken, from getting any transportation from "B" on the portion of his output not taken by "A," which is available for shipment by "B," and on which he has a legal right of transportation by "B."

(b) Because the joint-mine owner has a legal and constitutional right to carriage by "B" as an independent competing carrier of any goods which it has available for shipment, on a parity with any other shipper offering a similar amount of goods to "B."

(c) Because "B" has no right to refuse transportation to a joint-mine shipper because he has previously offered his full output to "A" and had a portion of his goods accepted for shipment on that offer.

(d) Because Rule 4 denies to the joint-mine shipper these legal and constitutional rights to transportation.

(e) Because under Rule 4 the two independent and competing carriers in times of car shortage operate as if they were a single corporate carrier so as to give to the joint-mine shipper only the service, and in some circumstances less than the service, to which he would be entitled if they were in fact a single corporate carrier.

(f) Because any joint arrangement by which the two carriers act under a common rule by

which either carrier refuses transportation to a shipper who has goods to ship by it and offers such goods to it, on the ground that the shipper has previously offered his output to the other carrier and had a portion of the goods accepted on an allotment of cars by it would be an illegal combination in restraint of trade in interstate commerce.

(g) Because the carriers make no such rule with respect to other commodities than coal and the fact that the particular commodity to be shipped is coal has no bearing on the rights of transportation which should be accorded to joint-service shippers, and the picking out of one commodity, coal, for the application of this rule would be arbitrary and unlawful.

7. That Rule 4, being invalid if voluntarily put into effect by the railroads, is also invalid when put into effect by the order and direction of the Commission.

8. That the corrective power of the Court to set aside this action of the Commission is settled by the decision of this Court in *Interstate Com. Com.* v. *Union P. R. Co.*, 222 U. S., 541, and for each of the reasons there recited:

(a) The depriving of the joint mines of their legal rights of transportation was beyond the power which the Commission could constitutionally exercise because the railroads and the shipper are protected in the enjoyment of those rights under the common law and by constitutional guaranties.

(b) The action of the Commission was beyond its statutory power because the Commission is not empowered by the statute to take away rights of and to transportation vested by law in the railroads and the shipper. The power of the Commis-

sion is to execute and enforce the Interstate Commerce Act, not itself to legislate.

The action of the Commission putting Rule 4 into effect was also beyond its statutory power because Rule 4 forces the carriers into a combination in restraint of trade in violation of the Sherman Act.

(c) The action of the Commission was based on a mistake of law, in that the Commission acted under the mistaken legal conception, either that the joint mines had no such legal rights as are here asserted, or that if they did the Commission had power to deny or change them.

(d) Rule 4 as laid down by the Commission is confiscatory of the property rights, both of the railroads and of the joint-mine shipper.

(e) The action of the Commission is invalid because it is arbitrary and founded on no grounds in which the conclusion reached could properly be founded.

(1) The rule is applied only to coal. It is entirely arbitrary to deny to a joint-service shipper of coal transportation rights which have from the commencement of common carriage been enjoyed by all joint-service shippers.

(2) The grounds on which the Commission puts Rule 4 into effect are not such as should or could properly determine the conclusion.

(f) The Commission's course in utterly ignoring and giving no consideration to the legal rights of transportation of the joint mines and in depriving them of those rights on grounds wholly without the Commission's jurisdiction was an exercise of the Commission's powers in an unreasonable manner. The Commission's action takes the form of a car-service rule which is in fact nothing else than a determination of the question of legal rights of transportation.

9. The District Court for the Southern District of West Virginia had jurisdiction of the bill of complaint and is not ousted of its jurisdiction because the order of the Commission was in form negative. The District Court was correct in holding that the order was in fact and effect affirmative in character. In entering the order of dismissal of the complaint before it the Commission had first to, and did, reverse an order which affirmatively condemned a rule which it had previously found unreasonable. This action was affirmative. Furthermore, whatever the form of the order, it authorized and required the carriers to publish and enforce a rule of car distribution which was illegal without such authority.

THE FACTS.

The only facts presented to the Court below in support of the bill of complaint on the merits of the controversy, beyond those appearing in the findings of the Commission, were those tending to establish that the action of the carriers in putting Rule 4 into effect was affirmatively controlled and required by the order of the Commission complained of, and that the Interstate Commerce Commission has never issued an order limiting in any respect the car service to be given to joint shippers of commodities other than coal (p. 135).

History of Rules.

Coal-car distribution rules are rules provided by each carrier serving coal-producing territory in order that the available empty cars of each such carrier in the field of production shall be distributed in times of car shortage without discrimination among the mines served by it. The complexity of the railroad operating

problem in the distribution of coal cars at bituminous coal mines makes it imperative, as a practical matter, that a code of rules govern this operation. The only fact, however, that differentiates the shipment of bituminous coal from that of other commodities is that the nature of the business is such that the coal is tendered for shipment in the cars of the carrier when they have been placed at the mine tipple. The tender for shipment is therefore controlled by the number of empty cars supplied. The legal rights of coal-mine operators do not differ from those of shippers of other commodities. The legal rights and obligations of the parties to transportation contracts are not determined by the orders for cars placed by the shippers but are determined by the supply of cars furnished by the carriers.

Various rules of mine rating and car distribution applied by the several carriers so far as to effect an equitable distribution of the available car supply in the several coal fields have been considered by the Commission and by this Honorable Court in a long series of cases:

R. R. Com. of Ohio et al. v. *H. V. Ry. Co.*, 12 I. C. C., 398.

Traer v. *Chicago & Alton Railroad Co. et al.*, 13 I. C. C., 451.

Interstate Commerce Commission v. *I. C. R. R. Co.*, 215 U. S., 452.

Rail & River Coal Co. v. *B. & O. R. R. Co.*, 14 I. C. C., 86.

Hillsdale Coal & Coke Co. v. *P. R. R. Co.*, 19 I. C. C., 356.

In re Irregularities in Mine Ratings, 25 I. C. C., 286.

Coal and Oil Investigation, 31 I. C. C., 193.
Assignment of Freight Cars, 57 I. C. C., 760.
Southern Appalachian etc. Asso. v. *I. & N. R. R. Co.*, 58 I. C. C., 348.
Lambert Run Coal Co. v. *Baltimore & Ohio R. Co.*, 258 U. S., 377.

To apply the car-distribution rules, each mine on each line of railroad is rated on the basis of the determined daily capacity of the mine to produce and ship coal. This is not disputed upon this record, as the pleadings admit the averment of the bill of complaint in Section IX thereof:

> "The ratings of all mines under said rules represent, for purposes of car distribution, the daily capacity of the mines to produce and ship coal."

The rules for the rating of mines are not in issue in these proceedings, nor were they in issue before the Commission. The case from the outset has been confined to the rights of the shippers of coal to receive cars in which to transport the rated capacity of the mines to ship.

The rules for the distribution of coal cars by each defendant carrier for many years prior to Federal control provided for a pro rata distribution, in accordance with the mine ratings, of available cars among all mines served by each, whether or not such mines were also served by a competing carrier (pp. 26 and 135). Obviously, if a mine were so geographically located as rightfully to demand service from each of two or more carriers, it received, and was entitled to receive, more empty cars for loading than did a local mine of similar rating which was dependent for its car supply on a single one of such lines. Thus in times of

car shortage the joint mines worked more steadily than did mines that were dependent on a single line of railroad. This fact led early to controversy between the local and the joint mines.

In 1911 the situation on the Illinois Central Railroad as between the local and the joint mines was submitted to the Commission for an adjudication upon that carrier's obligations in the premises. The Commission thereupon entered upon an investigation known on its docket as *In Re Irregularities in Mine Ratings, supra.* The Commission's exhaustive study and discussion of the facts and the law, both with relation to the rating and the distribution of cars to mines, are set out in its report in *In Re Irregularities in Mine Ratings, supra,* hereinafter referred to as the *Illinois case.* The Commission therein held: (1) That a joint mine should be rated by *each* carrier at its daily capacity to produce and ship coal, thereby recognizing the right of such mines to offer the entire output of the mine on any day for a shipment by either of the carriers serving it; (2), that when a joint mine shipped a part of its rated capacity by one carrier on a given day it thereby automatically limited its capacity to ship coal by the other carrier serving it, but did not destroy its right to ship the balance of its output by such other carrier; (3) that it would be reasonable for each carrier to announce to its shippers on any afternoon the percentage proportion of the orders for available cars which it would have for distribution on the following day; and (4) that it would be reasonable to provide a rule of limitation upon the distribution to joint mines based upon a percentage of the rated capacity of the mine to produce and ship coal, so that on any day a joint mine which desired to ship

by two carriers should limit its order to each to 75 per cent of its rating; if it were served by three carriers, to 50 per cent of its rating; so that in the aggregate it would not place orders for cars in excess of 150 per cent of its rated capacity to produce and ship coal. The Commission in that proceeding soundly defined the legal rights of the joint-mine shippers and fixed the administrative rules of car distribution within the legal limits of its discretion. The case stood without further controversy until the railroads were taken over by the Government.

During Federal control of the railroads the United States Railroad Administration adopted rules of car distribution which were published as Car Service Circular C. S.-31. In Rule 2 of the rules of car distribution contained in said car service circular it was provided:

> "Copies of orders for cars for a mine that is joint with any other carrier (steam, electric or water) shall be filed with the designated representative of each such carrier; such combinations of orders must not exceed the gross daily rating of the mine."

Thereafter Car Service Circular C. S.-31 was revised and put into effect on January 10, 1919, as Car Service Circular C. S.-31 Revised, in which the rule aforesaid was continued without change but was numbered Rule 4. It is accordingly spoken of throughout these proceedings as Rule 4. The rule thus promulgated by the United States Railroad Administration limited the right of a joint mine to *order* cars in which to ship coal in times of car shortage from all of its connections to

100 per cent of its daily rating, regardless of the supply which such carriers might have available for distribution and regardless of the amount of coal the mine might produce. Under Rule 4, if a joint mine on any day of car shortage *orders* cars to the extent of its rating from one carrier and is *supplied* with only 50 per cent of the order, because that percentage only is available for distribution by that carrier, the mine is not permitted to order any cars from its other connection in which to ship any of the part of its output rejected by the first carrier.

The appellees, as to their joint mines, protested against but acquiesced in the rule laid down by the Railroad Administration, promulgated at a time when there was a continuous or nearly continuous full supply of railroad equipment due to various methods of control of the marketing of coal adopted by the Government, but the rule was continued to the end of Federal control. Immediately thereafter, on March 2, 1920, the Commission issued its circular, recommending to all carriers that they continue in force the said Circular C. S.-31 Revised until such time as the experience of the carriers or the Commission should dictate other and more appropriate rules for the rating and distribution of cars to coal mines. In accordance with and in compliance with said action of the Commission, the rules of said circular were continued in force by the carriers. Under date of April 15, 1920, the Interstate Commerce Commission, acting under its emergency powers, as defined in paragraph (15) of Section 1 of the Interstate Commerce Act, ordered and directed the carriers to modify one of the rules contained in said Circular C. S.-31 Revised, which said modification is not here involved, but otherwise recommended that the

other rules of said circular, including Rule 4, be continued in force and applied; and, *in accordance with and in compliance with said action of the Commission, Rule 4 was continued in force* by the carriers defendant in the court below.

On or about July 8, 1920, these carriers applied informally to the Commission for permission to abrogate Rule 4 and to put into effect the rule laid down by the Commission in the *Illinois case, supra. This* application was refused by the Commission and, because of said refusal, Rule 4 was continued in effect by the carriers.

Proceedings Before Interstate Commerce Commission.

Thereafter, on January 11, 1921, the appellees filed complaints before the Commission separately against the Chesapeake & Ohio Railway Company and the Virginian Railway Company, respectively, alleging as to each carrier that said Rule 4 of Circular C. S.-31 Revised was unjust and unreasonable in violation of section 1 of the Interstate Commerce Act as amended, particularly paragraphs (11) and (12) of said Section 1, and unduly preferential of appellees' competitors, local mines on each such carrier, and prejudicial of appellees in violation of Section 3 of said Act. These two separate complaints were by the Commission consolidated with each other and with certain other similar complaints filed by an operator of joint mines in another field. They were assigned for hearing, brief, argument and decision to Division 5 of the Commission, and the decision of the Commission thereupon was issued by said Division 5 on June 21, 1921, in *Fairmont & Cleveland Coal Co.* v. *B. & O. R. R. Co.,* 62 I. C. C.,

269. A copy of this decision is appended to the bill of complaint as Appendix B (p. 24).

In said decision the Commission found that Rule 4 was unjust and unreasonable and unduly prejudicial of appellees herein, and others similarly circumstanced, and unduly preferential of the mines on each of the carriers that were served singly by each such carrier, and the Commission held and found that the rule laid down in the *Illinois case, supra,* was the just and proper rule and, while stating "We have not required that car service rules be filed as tariff schedules," directed as follows: "We shall expect, however, that defendants will promptly amend their car service rules so as to conform with our findings and evidence same by filing copies thereof with us." The rule of the *Illinois case,* thus authorized and directed by the Commission to be applied by the carriers, was put into effect by the carriers and published in their respective rules of car distribution. By this action of the Commission, Rule 4 was abrogated and the rule of the *Illinois case* came for the time being into effect as the rule prescribed by the Commission.

Complaints substantially similar to those involved in the *Fairmont & Cleveland case, supra,* were filed with the Commission by certain operators of mines served by more than one carrier in Illinois and Indiana against the carriers serving the mines in those states. These complaints were known as Interstate Commerce Commission Dockets Nos. 12,362 and 12,399, respectively. Hearing was duly had upon said latter numbered complaints, and a tentative report upon such record was made by an examiner of the Commission, in which it was proposed to confirm the decision

in the *Fairmont & Cleveland case, supra.* Petition had in the meantime been filed to reopen these latter cases for further consideration and the Commission did reopen them and consolidate them for argument with the records made in Dockets Nos. 12,362 and 12,399. Argument was had upon the records thus consolidating all of the cases involving the car distribution rules to mines served by more than one carrier, and on December 11, 1922, the Commission entered its decision, ruling and order, known as *Bell & Zoller Coal Co.* v. *B. & O. S. W. R. R. Co.*, 74 I. C. C., 433. This decision will be hereinafter referred to as the *Bell & Zoller case.* It is this decision and order that is enjoined in these proceedings. A copy of this decision and order is appended to the bill of complaint (p. 31).

In its decision, ruling and order in the *Bell & Zoller case* the Commission found, in reversal of its previous decision, ruling and order in the *Fairmont & Cleveland case, supra,* that Rule 4 of C. S.-31 Revised was not "in principle unjust or unreasonable or unduly prejudicial" and that "our former conclusions in the Fairmont cases * * * are *reversed,*" and the Commission entered an order to dismiss the complaints in all of the cases recited.

By thus reversing its previous conclusions and directions in the *Fairmont case* the Commission annulled, as of the date of December 11, 1922, its previous action by which it had abrogated Rule 4 as the rule to be followed by the railroads and it simultaneously restored Rule 4 as the effective rule of car distribution.

In its decision the Commission shows the effect of Rule 4 upon the distribution as between the joint and local mines:

"The operation of Rule 4 is shown by the following example: A joint mine with a gross daily rating of 50 cars located on carriers A and B orders all of its cars from carrier A, which has an 80 per cent car supply. The joint mine will receive the same number of cars as a local mine with a daily rating of 50 cars on carrier A. However, if carrier B has a 50 per cent car supply and the joint mine divides its order equally between the two carriers it will receive 80 per cent of 25 cars, or 20 cars, from carrier A, and 50 per cent of 25 cars, or 12.5 cars, from carrier B, a total of 32.5 cars compared with 40 cars received by the local mine on carrier A. Should the joint mine order more than half its cars from the carrier with the greater car supply this will change the figures somewhat, but in no instance will the joint mine receive as many cars as the local mine served by carrier A if the orders are divided. The complainants concede that the joint mine will, in the aggregate, receive more cars than the local mine located on the carrier with the lesser car supply, and it possibly may receive more cars on the average than the local mines of similar rating on both carriers."

Thus it appears that the Commission, by its approval of Rule 4, has authorized and required each of the carriers to limit its car service to the joint mines below that which each such line furnishes of its available cars to the local mines served by it. *In the aggregate the joint mine receives, under the rule, less cars from both carriers in times of car shortage than the local mines served by the carrier having the largest percentage of car supply.* Each carrier, having a several obligation to treat all of its own shippers impartially under the statute and at common law, is none the less authorized and required by the Commission's

order to give the joint mine less service than it gives to the local mine. In other words, car service and transportation furnished to the joint mine by another independent and competing carrier is used to excuse the first carrier for its failure to meet a fundamental and several obligation which its calling entails upon it.

This limitation upon the rights to transportation and the right to contract that is placed upon the joint mine, and which is the gravamen of this proceeding, may be best illustrated by the following example: A joint mine with a gross daily rating of 50 cars located on carriers A and B *orders* the full amount of its rating from carrier A which has an 80 per cent car *supply*. The joint mine will receive the same number of cars as any local mine with a daily rating of 50 cars on carrier A, or 40 cars. The joint mine then has remaining ten cars, that should be as free as any other shipper's coal, and it offers these 10 cars to road B but it is denied transportation of all 10 cars under the rule, notwithstanding that carrier B has a 50 per cent car supply and that, if said 10 cars were offered by a local mine, carrier B would be obligated to furnish 5 cars. The working of the rule is thus stated in its barest simplicity because by placing its orders in the manner last described the joint mine receives more cars than it can by any other method of placing its orders under Rule 4.

A mine that has so located itself as to have the service of both roads has broadened its markets and has entered upon obligations to its customers on both lines of railroad which it must meet. In order, under Rule 4, to get even the same car supply as would a local mine on the road having the larger car supply the joint mine must give up all of its advantages of

location and become itself a local mine on that railway.

The joint mine has acquired its location of this character only by large expenditures of money. The particular joint mines involved in this case are operating for the most part deep-shaft mines which can be operated only at great expense. They must necessarily have a nearly continuous operation in order to meet their very heavy overhead expense. They would not have undertaken such deep-shaft mine development and made the expenditures necessary to the location if they had not relied upon their legal right to transportation over two lines of railroad.

The testimony before the court below upon the irreparable damage that would have been done to the appellees had Rule 4 been permitted to become effective is full and complete and sustains the finding of the court in this regard.

The Various Joint Mine Rules.

Four rules to govern the distribution of cars to joint mines have been considered in the course of the litigation upon this subject. They are set out in some detail below and may be described briefly as, and for convenience are entitled, respectively, (1) The New River Rule; (2) The Common Law Rule; (3) The 150 Per Cent Rule; and (4) The 100 Per Cent Rule (Rule 4).

The New River Rule.

The rules of car distribution as promulgated and applied by the railroads under the mandate of paragraph (12) of Section 1 of the Interstate Commerce

Act, and as approved by the Interstate Commerce Commission are based on the mine ratings as established in the mine-rating rules. For many years prior to the war, as recited by the Commission in the *Fairmont & Cleveland case, supra,* the Chesapeake & Ohio Railway made no distinction between joint and local mines and distributed to the joint mines their proportionate share of the available car supply in the region as determined by the rated capacity to ship, and without reference to or inquiry into the car supply furnished by the Virginian Railway to these mines. In this connection, it seems proper to direct the attention of the Court to an error in the brief for the appellant local mine operators in Case No. 628. Therein, on page 3, the statement is made that "formerly the Virginian and the Chesapeake & Ohio rated mines in different ways, *but in accordance with the shipments made by the various mines over their respective lines during some previous period.*" (Italics ours.) The Commission finds the facts before it to be contrary to what is thus stated. The practice on the Chesapeake & Ohio, and the Baltimore & Ohio, and the Monongahela Railroad as well, was to rate the joint mine on the basis of the full 100 per cent of its determined capacity to provide coal (pp. 25 and 26). It is necessary for each carrier serving a joint mine to rate that mine at the full 100 per cent of its shipping capacity, for otherwise there would be no basis upon which to determine the car supply properly accruing to the joint mine from any particular carrier on such days as that mine may choose to order its entire output from the one carrier. This, indeed, is exactly what the Commission finds must be the correct method of regulating the situation. *In Re Irregularities in*

Mine Ratings, supra, at p. 296, wherein the Commission said:

> "Having the right to assert its full capacity against the Illinois Central on any day, it follows that the junction-point mine must have a rating on the Illinois Central equal to its full capacity, or it would not be able to secure its quota of the available cars on the day when it elects to assert its full capacity against that line."

This method of car distribution to joint mines was also in force on many other railroads. The only limitation placed upon the joint mine was that its orders for cars, based on its rating, should not result in an aggregate car supply greater than the capacity of the mine to ship. If, in practice, the orders were so placed that the supply received from the two railroads exceeded the capacity of the mine to ship, a penalty rule was provided to limit the car supply for succeeding days and ultimately to be reflected in the rated capacity of the mine for succeeding months.

The pre-war rule of the Chesapeake & Ohio we herein refer to as the New River rule. Based on this rule, on the fact that car-distribution rules generally were based on the rated capacity of the mine, on the fact that the obligation of each carrier in the matter of car distribution in times of car shortages is that of equity of distribution between the mines served by each such railroad, and on the provisions of paragraph (12) of section 1 of the Interstate Commerce Act, wherein the obligation is placed upon each carrier severally to distribute cars in accordance with the ratings of the mines, the appellees herein contended before the Interstate Commerce Commission that they

had the right to order 100 per cent of their daily ratings from each of their connections in times of car shortage, and that each road was obligated to serve each of the mines tributary to its rails without discrimination, based on the rated capacity of the respective mines on its line. The appellees conceded before the Commission that the obligation was upon them in the public interest so to arrange their *orders* for cars that the *supply* they received in the aggregate should not exceed the capacity of the mines to ship, and that the obligation of each of the railroads in the public interest was so to limit the car *supply* furnished that there should result no wastage of cars.

The rule last described has sometimes been called the 200 per cent rule, and argument has been made to the effect that the joint mine thereby undertook to order cars in excess of its capacity to ship. Such is not the case. The joint mine's capacity to ship is determined in the same manner as is the local mine's. Of two mines of the same rated capacity, one local and one joint, each offers its rated capacity for shipment. The local mine offers its rated capacity to the single railroad which serves it; the joint mine offers its capacity to two railroads. Each carrier is obligated to furnish cars without discrimination, based on the ratings, as between the mines which it serves on its own line of railroad.

It was contended, therefore, that so long as the railroads, the Commission and the Interstate Commerce Act employed the rated capacity of the mine as the basis for distribution in times of car shortage, the carriers might, without violating any obligation which they had to other shippers, distribute cars under the New River rule; and that this rule might with pro-

priety be found by the Commission to be just and reasonable, and violative of no property rights of local mines on either line of railroad. Local mine operators on the Virginian have no rights in the car supply furnished by the Chesapeake & Ohio, and *vice versa,* the Chesapeake & Ohio operators have no property rights in the cars furnished by the Virginian. The joint mine has property rights in the car supply of each.

The New River rule was applied by the carriers prior to the war in consonance with their practices as to commodities in general. That is to say it is the practice of the carriers, in order to secure for their respective lines all possible competitive freight, to give to joint shippers of commodities the best possible car service that is compatible with their obligations to shippers solely dependent upon them for car supply.

Had the Commission granted in full the prayer of the complaint, local-mine operators would have had no right to complain that their legal rights had been invaded. If the Commission had exceeded this prayer and granted more to the joint mines than is included therein, the local-mine operators might have had a just cause of complaint that their legal rights had been invaded. So here, the joint mines have complained that the Commission has exceeded its legal and statutory powers in authorizing and directing the carriers to reduce car supply below the limits of legal right as stated by the Commission itself in the *Illinois case, supra,* and as known to the common law.

When, in the *Fairmont & Cleveland case, supra,* the Commission put in effect the rule known as the Illinois or 150 per cent rule, the appellees acquiesced in said decision, believing that, although the Commission thereby reduced the car supply of joint mines some-

what below the minimum of their legal rights, nevertheless the rule was a practical one and granted to the joint mine operators an approximation to their minimum legal rights.

In the area between the maximum desires of the joint mine operators (the New River rule) and the minimum of their legal rights (the common law rule) the Commission's conclusions were final upon all the parties. When the Commission went beyond this field of its administrative action it invaded property rights of the appellees which the courts are bound to protect as guaranteed by the common law and by the Constitution.

The Common Law Rule.

In its opinion in the *Illinois case, supra,* the Commission's reasoning points to the rule which the Appellees rely on as the proper measure of their minimum rights. The rule which would follow the reasoning in the *Illinois case* is hereinafter referred to as the common law rule. It is described in the dissenting opinion of Commissioner Potter in the *Bell & Zoller case, supra,* in the following language. (The entire dissenting opinion is quoted):

> "I favor the application of the rule of the *Illinois case.* To do otherwise is in my judgment to deprive of valuable advantage of location and destroy absolute right under the law. It seems to me the majority report tends to make law rather than apply and enforce it. I think a joint mine has the right to be regarded by each road as though that road were the only road serving it. It loses no right from one when another reaches it.

It should receive prorated equipment from each road based on the traffic which it tenders to that road in proportion to the traffic tendered by other mines. The volume to be considered as its tender to a particular road is its rated output less the tonnage to be shipped by other lines. The rule of the *Illinois case* in application recognizes a mine's rights and affords method to work them out with substantial justice in a practical manner. If opportunity to ship over more than one road gives a joint mine an advantage in being able to furnish to labor more nearly continuous employment, that advantage belongs to the mine because of the superior transportation service available to it. We may not restrict the use of transportation facilities in order to equalize mine operation. To do so would be to require discrimination in the use of equipment—not remove it. If a local mine is at a disadvantage it is not because of a transportation problem with which we may deal but because of a labor supply problem which is not for us. It is by no means certain that the application of the rule of the *Illinois case* affects labor injuriously or tends to disturb the adjustment."

In the *Illinois case, supra,* the Commission requires that the carriers shall furnish daily to the operators a statement of the available car supply for the following day. Under the car service rules appended to the bill herein (paragraph 4(j) of the rules) the mines place their orders at 4 p. m. on each day for the following day.

To quote from the Commission's report in the *Illinois case,*

"The junction-point mine has a right to ship its output via either of the lines serving it."

and that it has the right to offer its entire output to carrier A or to carrier B and is entitled to its share of the available equipment of the carrier to whom it makes the offer. If the output is offered to carrier A and it has a short car supply it accepts this offer as to the part of the output which it can take, according to its percentage allotment of car supply, and necessarily is obliged to reject the remainder of the output.

The Commission in the *Illinois case* rejected the New River rule by which the joint mine used its full rated capacity as a basis for transportation orders from both carrier A and carrier B. It did this on the ground that when it had offered its capacity output of 3,000 tons to carrier A and 1,000 tons had been accepted for shipment, the shipper did not have this 1,000 tons to ship by carrier B but only 2,000 tons. It is to be noted this conclusion is not in violation of the decisions which will be cited holding that a carrier can not refuse transportation because a shipper has shipped part of its goods by another carrier. Carrier B has an obligation to transport only such goods as the shipper has for shipment.

The legitimate conclusion from the sound reasoning in the *Illinois case* was that the joint mine had rights of transportation as follows: That it could offer first to either carrier its entire rated capacity; that that carrier having accepted a part of the output which was offered, the shipper could then offer the rejected tonnage to the other carrier and would be entitled to transportation from that carrier on these goods, or if it was short in car supply, to a percentage of the goods proportional to the car supply. This is unquestionably the rule of common law, and the Appellees' claim is

that the rule thus described represents their minimum legal right to transportation which neither the railroads nor the Commission have the right to invade.

Illustrating this rule by specific figures: If the joint mine has a capacity of 50 cars, carrier A has an 80 per cent car supply and carrier B has a 50 per cent car supply, the mine can offer the 50 cars for shipment to A. A accepts, based on its 80 per cent car supply, 40 cars for shipment. The mine offers B the 10 rejected cars and B accepts 5 cars for shipment, based on its 50 per cent car supply. The joint mine will therefore get a total of 45 cars. It will be found that it makes no difference to the joint mine as to the total cars which it will receive on the application of this principle, whether it first offers its full capacity to carrier A or to carrier B, and that this is true whatever the figures of percentage of car supply may be on the two roads.

The 150 Per Cent Rule.

The Commission, in the rule which it laid down in the *Illinois case*, did not carry out its reasoning, as indicated under the last heading, to its legitimate conclusion by prescribing a rule of procedure as shown by the last illustration.

The reason which it gives for not so doing is that it might be difficult to determine which carrier should have the first offer of the mine's output and therefore the larger shipment. As a matter of fact, this would be determined, and properly determined, by the lawful option of the shipper first to offer its full output to whichever carrier it chooses. A shipper has the legal right to choose as he may like as to his shipment

between two or more carriers available to it. This is recognized by the Commission itself earlier in the *Illinois case,* where it says that the shipper—

> "may on any day tender its entire output to either of such lines and is entitled to its share of the available equipment on that basis."

There might be important and controlling reasons why, on account of the location of his customers, the shipper would feel impelled to send the larger amount of his goods by one carrier than by the other, or he might, on account of the greater efficiency of one carrier, prefer to ship by it. Such choice is the shipper's legal right.

For the reasons stated the Commission, however, put in what might be called a "rule of thumb." This did not secure to the joint mine its exact legal due, but it was nevertheless a rule susceptible of practical application and did substantially secure to all mines, both local and joint, the car supply to which they were entitled. This rule, which has come to be known variously as the Illinois rule, or the 150 per cent rule, was, as stated by the Commission, as follows:

> "We think that on days for which it orders no cars from any other carrier, the junction-point mine should be given its pro rata of cars by the Illinois Central on the basis of its full rating; that on a day for which it orders cars from one other road, its rating on the Illinois Central for that day should be 75 per cent of its full rating; and that on a day for which it orders cars from two other roads, its rating on the Illinois Central for that day should be 50 per cent of its full rating."

If the Illinois rule is applied to figures it will be found to work, in comparison with what the rule we have heretofore described as the common law rule calls for, and which the appellees claim measures their legal right of transportation assured to them by law, to the advantage of the joint mine when the shortage of cars on the two roads is slight, but to the disadvantage of the joint mine when there is an acute shortage.

For example, suppose the joint mine has a 50-car rated capacity and carrier A a 60 per cent car supply and carrier B a 50 per cent car supply. According to the common law rule the joint mine would first offer its full rated capacity to A and then offer its rejected output to B, or *vice versa*, and in either case would receive in the aggregate 40 cars, as follows: Shipper offers 50 cars to A; A, according to its percentage of car supply (60 per cent), accepts 30 cars and rejects 20; the shipper offers the rejected 20 cars to B, which, according to its percentage of car supply (50 per cent), takes 10 cars—total received by shipper, 40 cars.

Under the 150 per cent rule a shipper would receive from carrier A 60 per cent of 37.5, or 22.5 cars, and 50 per cent of 37.5, or 18.75 cars. Total number received, 41.25 cars. The joint mine shipper thus gains 1.25 cars by the 150 per cent rule.

On more acute car shortage, say with carrier A having a 40 per cent supply and carrier B a 30 per cent supply, the result is the other way. Following its legal rights to transportation, the shipper would get 20 cars from A and 9 cars from B, an aggregate of 29 cars. Under the 150 per cent rule, a shipper would get 15 cars from A and 11.25 from B, or a total of 26.25. The more acute the shortage the more the 150 per cent rule works to the joint mine's disadvantage.

The value of a car supply increases relatively to the shortage, for it is at times of most acute shortage that prices are highest and that the good will of customers is especially built up by service.

Both in depriving the joint mine shipper of this right to order its full output from either carrier first, according to its best business advantage, and in cutting down the proper transportation rights of the joint mine in times of serious car shortage, the 150 per cent rule encroaches materially on the joint mine's legal rights. Nevertheless, the appellees abided by it, though pointing out that the 150 per cent rule was unjust to them.

Rule 4, now ordered and authorized to become effective by the Commission, is destructive of the appellee's rights and the appellees have no choice but to seek legal relief therefrom.

Before leaving the illustrations given above of the application of car distribution rules, the Court's attention is called to the fractional car figures that result. This frequently happens and demonstrates that legal rights are determined not by the orders but by the supply of cars. Under no system of distribution are cars each day placed at mines with meticulous accuracy, as the Court would be led to believe in the comments in brief for the Commission concerning the alleged impracticability of the rule for which appellees contend. Inequalities of supply furnished by the carriers on any day are ironed out and corrected on subsequent days. (See Distribution Rule 11, p. 23.)

The 100 Per Cent Rule.

The rule provided by Rule 4 of Circular CS-31, Re-

vised, as heretofore stated, was adopted during the Federal control of railroads during the war. The rule was annulled by the Commission in the *Fairmont & Cleveland case;* and the action of the Commission in the *Bell & Zoller case,* in reversing its prior action, again orders Rule 4 into effect.

The operation of Rule 4 is to deprive the joint mine owners of what the appellees claim is their legal right of transportation, namely, (1) to first *order* cars as for the entire output from carrier A; (2) to receive from A an acceptance for transportation of such portion of the offered output as A can take, according to its car supply, and an allotment of cars to transport the same; and then (3) order cars from carrier B for the portion of its output which has been rejected by A and receive an allotment from B of a proportional number of cars according to its car supply percentage based on the amount of goods offered to it for transportation.

The business of the joint mine is developed to serve customers, some of whom can be reached only by one of the carriers and some only by the other, and is based on having the full service of each of the carriers to the extent that it needs it. In times of car shortage it is not only by Rule 4 cut down to the status of a one-line mine, *but in actual operation must necessarily be reduced to a lower status than the local mine on the line having the larger car supply.* The joint mine has customers on the line of the road having the lesser car supply and must completely lose the good will and therefore the business of those customers if it fails them in times of short car supply and scanty coal supply; therefore, it must use the road having the lesser car supply, in which case it will, under Rule 4, receive less cars in the aggregate than the single-line mine.

Developed in its investment, equipment, organization and overhead expenses to do a business based on the service of two roads, and in reliance on that service, it is nevertheless reduced to a lower status than the mine located on one of the two roads and whose investment and business has been developed in reliance only on the service of that road.

There is no dispute about the practical effect of Rule 4, which is stated by the Commission in its report in the *Bell & Zoller case* (heretofore quoted at page 19 of this brief).

The Commission did not say, but Rule 4 in terms provides that if the joint mine orders its full rating from A on a given day it is not permitted to order any of the cars rejected by A from B. Nor did the Commission say, what is equally obvious, that if on a given day the carrier to which the cars are first offered has no cars available (even after accepting an order for part of the cars offered) the joint mine is nevertheless, under Rule 4, prohibited from ordering any cars from the second carrier.

It is to be noted also that the rule applies even if one of the carriers happens to have a full or surplus car supply. In those circumstances, if the joint mine is obliged to make use of the other carrier to supply customers located on that line and whose needs may be acute, the joint mine to that extent is precluded from making use even of a surplus of cars on the first line.

ARGUMENT.

Jurisdiction of the Court.

Upon the appeal to this Court, the appellants,

United States and Interstate Commerce Commission, rely chiefly upon the motions to dismiss the complaints that were filed by them in the court below. Also the intervening local-mine operators urge again the motion to dismiss which was filed on their behalf in the three-judge court. The first eleven exceptions filed by the United States and Interstate Commerce Commission, hereinafter collectively referred to as the Government, in Case No. 627, and the first thirteen exceptions filed by the intervening local-mine operators in Case No. 628, go to one or the other of the following propositions:

(1) That the order of the Interstate Commerce Commission complained against was negative, and therefore not reviewable by the courts.

(2) That the question presented for adjudication in these proceedings was one which rested *wholly* in the discretionary power of the Commission and was therefore not reviewable by the courts.

Interwoven in the second of these propositions is the contention of the Government that the facts alleged in the complaint did not constitute a cause of action in equity.

With respect to these contentions the position of the appellees here is that the decision of the District Court for the Southern District of West Virginia is based upon sound principles of law in that:

(1) The decision, order, and ruling of the Commission in the *Bell & Zoller case, supra,* was affirmative in character, substance and effect, and therefore reviewable.

(2) An order of the Commission, to fall within

the rule laid down by this Court in the *Proctor & Gamble case,* 225 U. S. 282, must be negative in substance as well as in form.

(3) The case of *Proctor & Gamble Co.* v. *United States, supra,* and cases resting thereon, upon which the appellants rely, do not oust the courts of jurisdiction to review a negative order of the Interstate Commerce Commission in cases such as this where the Commission has stepped beyond the realm within which its administrative judgment is supreme, and has affirmatively denied relief that is guaranteed to litigants by the Constitution, common law, and the statutes under which the Commission obtains its jurisdiction.

(4) Whatever else may be said regarding the negative character of the order of the Commission, it affirmatively authorized, permitted and required the carriers to publish and enforce the objectionable rule of car distribution, in derogation of their common-law obligation to serve these complainants indifferently with the other operators of coal mines served severally by them.

The Commission's Order Is Affirmative in Substance and Effect.

It is the contention of the appellees here, sustained by the Court below, that the action taken by the defendant railroads as to Rule 4 has at no time been taken on their own initiative, according to their own views, or of their own volition, but that they have at all times acted in accordance with and pursuant to the directions, dictation, decisions, rulings, requirements and orders of the Commission and by its authority. The course of events as to Rule 4, as already shown, was as follows:

(1) It was by order of the Director General of

Railroads in force at the termination of Federal control.

(2) From March 2, 1920, two days after the termination of Federal control, until July 8, 1920, it was kept in effect by the carriers pursuant to recommendations of the Commission of March 2, 1920, and April 15, 1920.

(3) On July 8, 1920, the carriers defendant below applied to the Commission to abrogate Rule 4 and to put into effect the Illinois Rule. This application was refused by the Commission and because of this refusal Rule 4 was kept in effect. It was thus the action of the Commission which kept it in force.

(4) On June 21, 1921, in the *Fairmont case, supra,* which was a formal proceeding which had been brought before the Commission for the abrogation of Rule 4, in which the appellees and the carriers defendant below were all parties, the Commission held that Rule 4 was unjust and unreasonable and unduly prejudicial of the complainants and that the Illinois Rule was the just and proper rule and directed as follows: "We shall expect * * * that the defendants will promptly amend their car service rules so as to conform with our findings, and evidence the same by filing copies thereof with us." This the carriers promptly did, taking out Rule 4 and substituting the Illinois Rule therefor.

(5) Later the Commission reopened the *Fairmont case,* consolidated it with the *Bell & Zoller case, supra,* and on December 11, 1922, rendered a decision in the consolidated case in which it found the Illinois Rule was not a proper rule, but that Rule 4 was the proper rule and reversed its previous abrogation of Rule 4 in the *Fairmont* decision, stating "Our former conclusions in the *Fairmont case,* based on a mistaken adherence to and extension of the decision in the *Illinois case,* are reversed."

This action on the part of the Commission by which Rule 4 was again ordered into effect was on its own initiative and not on the application or request of the defendant carriers, and, in fact, contrary to their views of what rule should prevail, as was shown by their application of July 8, 1920, for permission to abrogate Rule 4. The Commission by its order in the *Bell & Zoller case, supra,* made its report, in which it reversed its conclusions in the *Fairmont case, supra,* a part of the order; after Rule 4 had been abrogated and the Illinois Rule substituted in accordance with the Commission's first decision and direction in the *Fairmont case, supra,* Rule 4 was out of existence and there was nothing for the petition in the *Fairmont case, supra,* to be applicable to except as the Commission itself might on the hearing on the reopened case first put back Rule 4 and then deny the petition to abrogate it. That is exactly what it did do.

This reinstatement of Rule 4 was by the *affirmative action of the Commission on its own initiative.* Such action is clearly reviewable on the question of the legality of that Rule raised in the complaint herein.

Under these circumstances the District Court correctly held that Rule 4 was published by the carriers because of and pursuant to action of the Commission requiring them so to do.

It cannot be doubted that if the complainants, on the theory that the recent abrogation of the Illinois Rule and the reinstatement of Rule 4 was solely the voluntary act of the railroads, had brought their bill of complaint against the railroads without joining the United States, any court would, on evidence of the action as to Rule 4 which has been taken by the Commission and evidence that the railroads had, through-

out, acted, as to Rule 4, and were now acting, pursuant to and under the authority of the decisions, rulings and orders of the Commission, have held that there was no jurisdiction except in a three-judge court in a suit in which the United States was made a party as representing the Commission, as was held both by the Circuit Court of Appeals and by this Court in the cases of

Baltimore & O. R. Co., v. *Lambert Run Coal Co.*, 267 Fed. 776, at p. 781 (opinion by Woods, C. J.).

Lambert Run Coal Co. v. *Baltimore & Ohio R. Co.*, *supra.*

The inaccuracy of the contention that the *Procter & Gamble case*, *supra*, is authority for the proposition that no negative order of the Interstate Commerce Commission is reviewable is of such consequence in this proceeding that it seems appropriate to review the cases on that particular subject.

Before the creation of the Commerce Court the decisions of this Court had settled and determined the precise extent within which the Circuit Courts of the United States could review the reports, decisions, and orders of the Interstate Commerce Commission. Just prior to the creation of the Commerce Court and the transfer to it of the jurisdiction formerly had by the Circuit Courts in these matters, the extent of that jurisdiction was summarized in a very concise way in two decisions of this Court. In *Interstate Commerce Com.* v. *Illinois C. R. Co.*, 215 U. S., 452, 470, this Court said:

"The statute endowing the Commission with

large administrative functions, and generally giving effect to its orders concerning complaints before it without exacting that they be previously submitted to judicial authority for sanction, it becomes necessary to determine the extent of the powers which the courts may exert on the subject.

"Beyond controversy, in determining whether an order of the Commission shall be suspended or set aside, we must consider (a) all relevant questions of constitutional power or right; (b) all pertinent questions as to whether the administrative order is within the scope of delegated authority under which it purports to have been made; and (c) a proposition which we state independently, although in its essence it may be contained in the previous one, viz., whether, even although the order be in form within the delegated power, nevertheless it must be treated as not embraced therein, because the exertion of authority which is questioned has been manifested in such an unreasonable manner as to cause it in truth to be within the elementary rule that the substance, and not the shadow, determine the validity of the exercise of the power."

These principles limited the Commission's action in fixing rates as to which it has a very large power and discretion; *a fortiori* they apply to a case turning on legal rights of transportation which is a question peculiarly for a court of law to determine.

The action of the Commission in putting Rule 4 into effect should be set aside for each of the reasons enumerated in *Interstate Commerce Commission* v. *Union P. R. Co., supra,*

(1) The depriving of the joint mines of their legal rights of transportation was beyond the power which the Commission could constitutionally exercise because the railroads and the shipper

are protected in the enjoyment of those rights under the common law and by constitutional guarantees.

(2) It was beyond the statutory power of the Commission because the Commission is not empowered by the statute to change or take away rights of and to transportation vested by law in the railroads and the shipper. "The power given is to execute and enforce, not to legislate."

It was also beyond the statutory power because Rule 4 forces the carriers into a combination in restraint of trade in violation of the Sherman Act.

(3) The action of the Commission was based on a mistake of law. In the *Illinois case, supra,* the legal rights in transportation of the joint mine are clearly stated and the rule laid down was intended to be in accordance with those rights and was in approximation thereof, but on account of the failure of the Commission to carry through its reasoning to its legitimate conclusion left the joint mines with less than they were legally entitled to. In the *Bell & Zoller* decision the Commission acted under the mistaken legal conception either that the joint mines had no such legal rights or that if they did the Commission had power to deny or change them.

(4) Rule 4 laid down by the Commission is confiscatory of the property rights both of the railroads and of the joint mine shipper as is shown at pp. 61 *et seq.* of this brief.

(5) The action of the Commission is invalid because it is arbitrary and founded on no grounds in which the conclusion reached could properly be founded.

(a) The rule is applied only to coal. The question involved is in no way peculiar to coal being solely the question as to what are the transportation rights of a joint service shipper. It is entirely arbitrary to deny to a joint service

shipper transportation rights, which have from the commencement of public carriage been enjoyed by all joint service shippers, merely because the particular commodity which the shipper desires to have transported is coal.

Connolly v. *Union Sewer Pipe Co.*, 184 U. S. 540, at pp. 560 and 563.

Matthews v. *The People of the State of Illinois*, 202 Ill. 389.

Crescent Liquor Co. et al. v. *Platt*, 148 Fed. 894.

Royal Brewing Co. v. *Mo., K. & T. Ry. Co.*, 217 Fed. 146.

If this change in transportation rights could be made as to one kind of merchandise at a time no industrial investment could be made with any relation to transportation facilities, as the particular merchandise produced by that industry might at any time be picked by the Commission for a change as to transportation rights. The question as to what are the proper rights of a joint service shipper as to transportation service is a general one and cannot properly be left in one way as to merchandise in general and dealt with in another way as applying to a certain kind of goods.

The intervening defendants in an amendment to their answer set up that the American Railway Association has adopted a rule applying to grain similar to Rule 4 as applied to coal. No such rule as to grain or any commodity other than coal has been put into effect by an order or decision of the Interstate Commerce Commission, and, if it had been, would as not applied to commodities in general be open to the same legal objection of arbitrariness, as well as to the other objections relied on by the complainants in this case as to Rule 4. No rule of the American Railway Association can be

legally obligatory. How far such a rule is followed as to grain by the railroads of the country in actual practice does not appear by any proof.

Reference is made to the following decisions of the Interstate Commerce Commission as to car distribution on grain shipments:

Farmers' Elevator Co. v. *C., M. & St. P. Ry. Co.*, 47 I. C. C. 475, decided November 28, 1917.

Tanner & Co. v. *C., B. & Q. R. R. Co.*, 53 I. C. C. 401, decided June 9, 1919.

Neither of these decisions in any way touched upon the question of orders for cars by a shipper located on more than one carrier.

(b) The grounds on which the Commission puts Rule 4 into effect are not such as should or could properly determine the conclusion.

The grounds are first that the transportation service enjoyed by the joint service shipper tended to the greater development of points where there was service by two or more carriers and tended to the seeking of access to those points by carriers by acquiring trackage rights or otherwise; and, secondly, that the dissatisfaction of labor was accentuated by the greater opportunities of labor at joint service localities.

The Commission refers to a wastage of cars but this is a matter merely of proper policing and, if necessary, of penalties.

(6) The Commission's course in utterly ignoring and giving no consideration to the legal rights of transportation of the joint mines and in depriving them of those rights on the grounds on which the Commission's conclusions were reached was an exercise of its powers in an unreasonable manner. While the Commission's action takes the form of a car service rule, it was in fact nothing else than a determination of the question of

legal rights of transportation, which is a proper question for court determination. The substance and not the shadow must be looked to. If the legal right to transportation is as contended for by the complainants herein then the right to cars for the transportation of tonnage offered by the joint mine to the respectve carriers follows as a matter of course.

The Order of the Commission Invades Legal Rights.

Nowhere in the decisions antedating the creation of the Commerce Court does there appear to be drawn the distinction between the "affirmative" and "negative" orders as such which has been made following the decision in the *Proctor & Gamble case, supra.* It is not necessary before this Court to review the history of that litigation so far as the Commerce Court was concerned. It suffices to say that that Court had attempted to interpose itself between the Commission and the Supreme Court as an appellant commission, empowered as an administrative tribunal, as well as an appellate court of law. This Court in its decision made it abundantly plain that no *administrative* questions covered by a negative order of the Interstate Commerce Commission are reviewable by the courts. The case stands for all time as the authority for that proposition.

The controversy before the Commission in the *Procter & Gamble case, supra,* differed widely from that which was presented to the Commission in this proceeding. There the Procter & Gamble Company was using its private property, namely, its privately-owned freight cars, in its service in interstate commerce. The carriers applied to such cars the same rules and charges respecting detention and demur-

rage as were applied to carrier-owned cars. The Procter & Gamble Company contended that those rules and charges were unreasonable and constituted an unjust discrimination against it. The question thus raised was solely an administrative one, strictly within the purview of the Interstate Commerce Commission, whose judgment with respect thereon was final. Thus is the doctrine of the *Procter & Gamble case* interpreted by this court in its very recent decision in *Baltimore & O. R. R. Co.* v. *United States,* decided March 3, 1924, 68 L. Ed. —. The property in question was private property, but had, as a matter of fact, been submitted by the Procter & Gamble Company to use in interstate commerce.

Here the complaint before the Commission was not merely one seeking relief with respect to an administrative question. It raised also the question of the legal right of these joint mines to the service of both the carriers. The problem before the Commission was, therefore, one of mixed law and administration, but because it involved the exercise of the Commission's administrative jurisdiction it had necessarily to be brought to the Commission rather than to the courts in the first instance. To have proceeded otherwise would have violated the rule laid down in a long series of cases by this Court.

Texas & P. R. Co. v. *Abilene Cotton Oil Co.*, 204 U. S., 426;

Interstate Commerce Commission v. *Illinois C. R. . Co.*, 215 U. S. 452;

Louisville & N. R. Co. v. *F. W. Cook Brewing Co.*, 223 U. S. 70;

Loomis v. *Lehigh Valley R. Co.*, 240 U. S. 43.

See in this connection the contentions of the complainants in the *Fairmont & Cleveland case, supra,* and in the *Bell & Zoller case, supra,* as recited by the Commission and found in the transcript of the record of No. 627 at pages 26, 28-29, and 37.

The action before the Commission, it will be observed, sought not only the establishment of the legal right of the joint mine to transportation from all the carriers serving it, but submitted the administrative regulation of that right to the Interstate Commerce Commission.

The appellees' constitutional, common law, and statutory right to service which it is here sought to enforce, is inevitably tied up with the jurisdiction of the Interstate Commerce Commission to say how it shall be enforced, but the right exists, nevertheless, and the fact that it is involved in and depends upon certain provisions of the act to regulate commerce makes it necessary for the appellees first to go to the Commission in an assertion of their rights. It cannot therefore be said that after so doing they may be estopped by the mere form of the Commission's order in negative language from a review of the affirmative action of the administrative body which curtails the right guaranteed by the Constitution, by the statute, and by the common law.

Contemporaneously with the decision in the *Procter & Gamble* case, *supra,* this court decided the case of *Hooker* v. *Knapp,* 225 U. S. 302. There the court used language which carefully saves to appellees herein their rights of appeal to this court. See *Hooker* v. *Knapp, supra,* at page 323, where the court said:

"We have determined in the *Procter & Gamble case,* 225 U. S. 282, 32 Sup. Ct. Rep. 761, that the commerce court was but endowed in considering whether an affirmative order of the Commission should be enforced, on the one hand, or set aside and declared nonenforceable on the other, with the jurisdiction and power existing at the time that act was passed in the circuit courts of the United States. And as, at that time, it was conclusively settled that the courts had only authority to re-examine the findings of the Commission as to subjects like the one here under consideration, for the purpose of ascertaining whether the action of the Commission was repugnant to the Constitution, in excess of the statutory powers conferred upon it, or manifested such an abuse as to be equivalent to an excess of authority, it clearly results that the court below was likewise limited in passing upon the petition before it in this case. This being true, it is also necessarily true that virtually the sole authority of the court below was in a sense confined to determining questions of law arising upon the case as presented on the face of the pleadings."

The later decisions of this Court on this subject confirm the language cited. In *Kansas City S. R. Co.* v. *United States,* 231 U. S., 423, 439 and 440, this Court defined the jurisdiction of the Commerce Court in substantially the same language as used in cases defining the jurisdiction over the decisions of the Commission formerly had by the Circuit Courts. The Court said:

"The authority conferred by Congress upon the commerce court (act of June 18, 1910, 36 Stat. at L. 539, chap. 309; Judicial Code, Sec. 207, 36 Stat. at L. 1148, chap. 231, U. S. Comp. Stat. Supp. 1911, p. 216) with respect to enjoining or setting aside the orders of the Commission, like the au-

thority previously exercised by the Federal circuit courts, was confined to determining whether there had been violations of the Constitution, or of the power conferred by the statute, or an exercise of power so arbitrary as virtually to transcend the authority conferred."

Very soon after this Court's decisions in the *Procter & Gamble case* and in *Hooker* v. *Knapp, supra,* there came a series of other decisions respecting the court review of the action of the Interstate Commerce Commission. These have made it clear that the limitations on such review, fixed in the *Procter & Gamble case* and in *Hooker* v. *Knapp, supra,* apply only when the action of the Commission was truly negative and within the scope of its statutory authority. Orders that are negative merely in form, but affirmative in substance, are clearly subject to review by the courts.

The Tap Line Cases, 234 U. S. 1.

Intermountain Rate Cases, 234 U. S., 476.

M'Lean Lumber Co. v. *United States,* 237 Fed., 460.

Hillsdale Coal & Coke Co. v. *Pennsylvania R. Co.,* 237 Fed., 272.

St. Louis Southwestern Ry. v. *United States,* 234 Fed., 668.

Louisiana & P. Ry. Co. v. *United States,* 209 Fed., 244.

The Government lays stress upon the decision of this Court in *Lehigh Valley R. Co.* v. *United States,* 243 U. S. 412, 414. But the language of the Court in that decision is in itself confirmance of the finding of the District Court in the instant case in that there this Court took cognizance of the distinction between

purely negative orders and orders which were negative in form but affirmative in substance.

Let the Court consider for a moment the position of your appellees when the Commission entered its final order of dismissal in the *Fairmont & Cleveland case*. The requirement of that order and of the Commission's report and decision, embraced therein by reference and incorporation, was laid upon the *railroads*, defendants before the Commission. Nothing was therein left to the volition of your appellees. Unlike the railroad in the *Lehigh Valley case*, they had no option as to their conduct in the matter determined by the Commission. They were absolutely foreclosed by the action of the railroads upon which the Commission laid the requirement to reinstate Rule 4. And the railroads had proceeded to comply with that order and requirement.

In *Manufacturers R. Co.* v. *United States*, 246 U. S., 457, this Court again affirmed its previously expressed opinions that the Commission's judgment was supreme when properly exercised on matters lying within its administrative discretion, but the Court further points out that in matters of constitutional right the Commission was not supreme.

In the late case of *Central Railroad Co. of New Jersey* v. *United States*, 257 U. S., 247, this Court draws the same distinctions between findings of fact and findings of law of the Commission and the extent to which the same will be reviewed. This case is particularly pertinent here as showing the power of the Courts to review the Commission's conclusions of law. It is to be noted also that the decision of the Commission was reviewed as a part of the order. In that case the Court said:

"As to administrative orders operating *in futuro*, the Commission's findings of fact are conclusive, subject to qualifications here not pertinent; and a finding that the discrimination is unjust is ordinarily a finding of fact. Maufacturers R. Co. v. United States, 246 U. S. 457, 481, 482, 62 L. Ed. 831, 842, 38 Sup. Ct. Rep. 383. But the question presented here is whether the discrimination found can be held in law to be attributable to the appellants, and whether they can be required to cancel existing joint rates unless it is removed. No finding made by the Commission can prevent the review of such questions."

The Court will note that in the instant case the appellees claim that as a matter of law the Interstate Commerce Act expressly provides that they are entitled to the relief to which their complaint before the Commission was directed, and that the decision and order of the Commission refused that which the statute in affirmative terms declares shall be granted.

The decision of this Court in the *Inter-mountain Cases, supra,* is conclusive of the jurisdiction of the three-judge court to review the order of the Commission here. At page 490 of that decision the following language is used:

"The second contention as to jurisdiction yet further affords an illustration of the same mental attitude, since it rests upon the assumption that the order of the Commission refusing to grant the request of the carrier made under the fourth section was purely negative and hence was not subject to judicial inquiry. The contention therefore presupposes that the power which from the beginning has been the subject of judicial review by the mere fact of its transfer to the Commission was made arbitrary. Besides, the proposi-

tion disregards the fact that the right to petition the Commission conferred by the statute is positive and while the refusal to grant it may be in one sense negative, in another and broader view it is affirmative since it refuses that which the statute in affirmative terms declares shall be granted if only the conditions which the statute provides are found to exist. It is, of course, true as pointed out in *Interstate Commerce Commission* v. *Illinois Central Railroad*, 215 U. S. 452, 470, and since repeatedly applied that findings of fact made by the Commission within the scope of its administrative duties must be accepted in case of judicial review, but that doctrine, as was also pointed out, does not relieve the courts in a proper case from determining whether the Constitution has been violated or whether statutory powers conferred have been transcended or have been exercised in such an arbitrary way as to amount to the exertion of authority not given, doctrines which but express the elementary principle that an investiture of a public body with discretion does not imply the right to abuse but on the contrary carries with it as a necessary incident the command that the limits of a sound discretion be not transcended which by necessary implication carries with it the existence of judicial power to correct wrongs done by such excess."

Again, on the jurisdictional question, the appellees rely upon the decision of this Court in *Skinner & Eddy Corp.* v. *United States*, 249 U. S., 557. Whatever may be contended by the appellants as to the negative character and effect of the order in the *Bell & Zoller case, supra*, it can not be denied that it was a requirement, an authority and a permission of the Commission for the carriers to put and keep Rule 4 in effect. The order is therefore clearly reviewable because Rule

4, so authorized by the Commission to be put in effect, deprives the appellees of transportation rights to which they are by law entitled. Stated in another way, if the bill in this proceeding had been brought to enjoin an order of the Commission by a complainant which had not applied first to the Commission for relief, the three-judge court would have had authority to have annulled and set aside the order and requirement of the Commission. This is clearly indicated by the following language in the *Skinner & Eddy case, supra*:

> "The defendants contend that the District Court did not have jurisdiction of the subject-matter of this suit; because orders entered in a fourth section proceeding cannot be assailed in the courts; at least, not until after a remedy has been sought under Sections 13 and 15 of the Act to Regulate Commerce. This contention proceeds apparently upon a misapprehension of plaintiff's position. If plaintiff had sought relief against a rate or practice alleged to be unjust because unreasonably high or discriminatory, the remedy must have been sought primarily by proceedings before the Commission (citing a long list of cases); and the finding thereon would have been conclusive, unless there was lack of substantial evidence, some irregularity in the proceedings, or some error in the application of rules of law (citing a long line of cases). But plaintiff does not contend that 75 cents is an unreasonably high rate or that it is discriminatory or that there was mere error in the action of the Commission. The contention is that the Commission has exceeded its statutory powers; and that, hence, the order is void. In such a case the courts have jurisdiction of suits to enjoin the enforcement of an order, even if the plaintiff has not attempted to secure

> redress in a proceeding before the Commission. (Citing cases) The Sacramento Case (United States v. Merchants & Mfrs. Traffic Asso., 242 U. S. 178, 61 L. ed. 253, 37 Sup. Ct. Rep. 24) was a case of this character. Compare Interstate Commerce Commission v. Louisville & Nashville R. R. Co., 227 U. S. 88, 92; Southern Pacific Co. v. Interstate Commerce Commission, 219 U. S. 433. The District Court properly assumed jurisdiction of this suit."

The Court will note that the District Court mentioned was a three-judge Court, specially constituted as was the Court below.

Finally, the theory of jurisdiction on which appellees have proceeded herein has been justified by this Court's decision on March 3, 1924, in *Baltimore & O. R. Co.* v. *United States, supra.* Throughout your appellees here have insisted that regardless of its form, the order of the Commission and the report embraced by reference therein, constituted an authority, a requirement, a permission, upon and to the carriers, to abolish the Illinois rule and to reestablish Rule 4. And thus that order, regardless of its form, is reviewable. For, said this Court in the case last cited, respecting an order that *authorized* the acquisition of one carrier by another:

> "Nor would the further fact that the order is permissive preclude review if by that term is meant an order, which, in contradistinction to one compelling performance, authorizes a carrier to do some act otherwise prohibited.".

From the decisions cited the conclusion follows inevitably that the court review of the reports, decisions

and orders of the Commission is governed by one or the other of the following propositions:

> 1. A negative order of the Commission denying relief in any case falling solely within the limits of the administrative power of the Commission is not reviewable by the courts because such review would, in substance, amount to a substitution of the judgment of the court for that of the Commission on a matter exclusively reposed in the Commission by the Congress.
>
> 2. Any order or requirement of the Commission which infringes or denies constitutional, statutory, or common-law rights or authorizes action by carriers which is equivalent to the infringement or denial of such rights, or is entered by the Commission under a mistake of law, or which is entered by the Commission acting arbitrarily or in an unreasonable manner, will be reviewed by the courts.

The instant case falls under the second of the propositions stated above, the effect of the order and requirement herein being an affirmative denial of legal rights, final jurisdiction of which is reposed in the courts and not in the Commission.

Application of the Law to the Facts of This Case.

Assuming, therefore, that the District Court for the Southern District of West Virginia correctly took jurisdiction of the bill of complaint in this proceeding, the application of the law to the facts found by the Commission in the present case is briefly as follows:

The Chesapeake & Ohio Railway has purchased, built, and equipped a railroad property in the New River District of West Virginia for service to the

mines located thereon. The mines are also served by the Virginian under trackage rights which it has acquired for valuable consideration. These mines thereon are entitled to the service of each railroad under the findings of the Commission. There are frequently long-continued periods of car shortage. Assume that during such a period of car shortage the Virginian has a 60 per cent car supply and the Chesapeake & Ohio has a 40 per cent car supply, and that a particular mine entitled to joint service has a rated output of 50 cars per day. The mine first offers its full output on a given day to the Virginian. The Virginian is able to accept and does accept, on account of its short car supply, only 30 cars of the 50 offered and rejects the offer of the remaining 20 cars. The mine then has 20 cars left for shipment. It desires to ship these by the Chesapeake & Ohio and offers them to that line. It is the lawful right of the mine to have its goods taken by the Chesapeake & Ohio on a parity with any other shipper offering a similar amount of goods. With a 40 per cent car supply, the Chesapeake & Ohio is under the legal obligation to take 8 cars. It cannot refuse to take them because the mine has chosen to ship a part of its coal via the Virginian, and the mine owner has both a common-law and the constitutional right to receive this transportation service from the Chesapeake & Ohio. If the two railroads entered into an agreement or arrangement by which each would refuse such shipment because the shipper had first closed with the other as to a shipment of part of its goods, such an arrangement or agreement would be unlawful as in restraint of interstate commerce. As a matter of fact, neither road desires to enter into such

arrangement, but on the contrary wishes to give the service which it is required by law to give.

At this point, however, the Interstate Commerce Commission intervenes, and by Rule 4 requires and authorizes the Chesapeake & Ohio to refuse transportation under the circumstances stated and requires and authorizes the Chesapeake & Ohio, in every case where the situation is as stated, to refuse transportation. It is the contention of the appellees here that the clear law is as found by the District Court, namely, that the carriers themselves could not so deny the transportation right of the mine owner and that there is no right in the Interstate Commerce Commission thus to deprive either the railroad or the mine owner of lawful rights to contract for transportation, and that the Commission is clothed with no power to authorize or permit or compel or require the railroads to enter into an arrangement which thus restrains interstate commerce.

Such was the law as analyzed and laid down by the Commission in the *Illinois case, supra,* where the Commission soundly stated:

> "The junction-point mine *has a right* to ship its output via either of the lines serving it." (Italics ours.)

And again:

> "If the shipper is unable to secure from the first line cars for more than 1,000 tons and still is able *to produce* 3,000 tons, it has 2,000 tons which it desires to ship over the second line." (Italics ours.)

It is the legal obligation of the second carrier to

accept this 2,000 tons, if it has a full car supply, or, if it has a short car supply, to accept such portion of it as it can take, according to its percentage of car supply. This is in accord with the principle which is stated most succinctly in the language of the Supreme Court of Maine:

> "Common carriers are bound to carry indifferently, within the usual range of their business, for a reasonable compensation, all freight offered, and all passengers who may apply."
>
> *New England Express Co.* v. *Maine Central R. R. Co.*, 57 Me. 188.
> *Southern Express Co.* v. *Memphis etc. R. Co.*, 8 Fed. 799, 802.
> *Messenger et al.* v. *Penn. R. R. Co.*, 36 N. J. Law Rep. 410.
> *A. T. & S. F. R. R. Co.* v. *D. & N. O. R. R. Co.*, 110 U. S., 667.
> *Missouri P. R. Co.* v. *Larabee Flour Mills Co.*, 211 U. S., 612.

The second carrier cannot refuse to take these goods because another and competing carrier has already accepted 1,000 tons of the shipper's output for carriage. As stated by the Supreme Court of Illinois in *C. & A. R. R. Co.* v. *Suffern*, 129 Ill., 274:

> "One railroad company is not justified in refusing to permit the owners of a coal mine to ship coal over its road because such owners also shipped coal from the same mine over the road of another railroad company. It is the duty of a railroad company to carry any freight that is offered provided its legal charges for such carriage are paid. It cannot take the position that it will not carry coal from a mine upon the line of its road unless it is allowed to carry all the coal from

such mine. It is for the interest of the public that there should be full and fair competition between the different railroad companies operating their lines in the state. Serious injury will result to the business interests of the country if shippers can be compelled by arbitrary measures to patronize one railroad to the exclusion of all others. No monopolies would be more odious than those which would result from the adoption of such a policy."

See also:

State Ex. Rel. v. *Citizens Telephone Company,* 61 So. Car. 83.
Bennett v. *Dutton,* 10 N. H., 481.
Sanford v. *Railroad Co.,* 24 Pa. St. Rep., 378.

The obligation of each of the carriers in the instance cited above is several and not joint. All of the pertinent provisions of the Interstate Commerce Act to which reference is made in Article VIII of the complaint lay the separate obligation upon each carrier. Particularly is the Court's attention called to the language of paragraph (12) of Section 1:

"It shall also be the duty of *every* carrier by railroad to make just and reasonable distribution of cars for transportation of coal among the coal mines served by *it,* whether located upon *its* line or lines customarily dependent upon *it* for car supply. During any period when the supply of cars available for such service does not equal the requirements of such mines it shall be the duty of *the carrier* to maintain and apply just and reasonable ratings of such mines and to count each and every car furnished to or used by any such mine for transportation of coal against the mine. Fail-

ure or refusal so to do shall be unlawful, and in respect of each car not so counted shall be deemed a separate offense, and the carrier, receiver, or operating trustee so failing or refusing shall forfeit to the United States the sum of $100 for each offense, which may be recovered in a civil action brought by the United States." (Italics ours.)

We shall later herein discuss the language of this paragraph of the Act to Regulate Commerce in connection with another exception filed by the intervening coal operators, appellants in Case No. 628. We refer to it here in connection with the finding of the Commission in all of the cases that the shipper has a right to order from every carrier the entire amount of its rating, and to call attention again to the proposition that in this case the appellees insist upon their right to order from the second carrier that part of their rated output which the first carrier has rejected. The paragraph from the Interstate Commece Act quoted makes very clear that Congress has not attempted to curtail the rights of the shipper had at common law.

These transportation rights may be illustrated by a homely example where coal is not the commodity transported. At Chicago, Ill., there are large stockyards. A shipper has 50 carloads of cattle in the stockyard. He calls up the Pennsylvania Railroad and asks if it can handle the shipments East. The Pennsylvania says that it can handle only 80 per cent of them on account of a short car supply and cannot accept the rest. The shipper directs that the 40 cars be placed and he will load them. The shipper then calls up the New York Central and asks if it can ship the 10 remaining cars. The New York Central, having a full car supply, places the 10 cars. Is there any

doubt that the shipper has the right to order the cars itself immediately from the New York Central without in any way affecting the obligation of the Pennsylvania to take the 40 cars under the contract for transportation which has been closed with it and for the fulfillment of which the shipper has reserved the 40 carloads of cattle to be taken? Any other view would lead to the ridiculous conclusion that the shipper must hold, feed, and pay for the care of the remaining 10 carloads of cattle at the stockyards until the Pennsylvania took the 40 carloads away, all to the benefit of no one and to the detriment of everyone.

The Commission, in the *Illinois case, supra,* found the law to be in full accord with what is contended in this illustration, but in the *Bell & Zoller case, supra,* it says:

> "We have indicated in proceedings of this character that the principle of *stare decisis* has no application, and that our determinations as to what will for the future be just and reasonable must meet changed conditions and wider knowledge, as developed by the passage of time."

We submit that this statement of the Commission can refer only to its decisions upon strictly administrative questions. Certainly the law remains the law, regardless of how administrative matters may be determined. But by its reversal of the *Illinois* rule after it had been in operation nearly 10 years, under the doctrine above laid down, the Commission, with a change of personnel, has reversed its *legal* conclusion. If the power of the Commission is so broad no industry would be safe in building up at a railroad center in reliance on the service of the roads located there,

for, with Rule 4 in effect, no industry could rely on the larger proportion of car supply which such location would give to it in time of car shortage.

That the Commission does not apply the doctrine of *stare decisis* to administrative questions is a proper recognition of the statutory enactment limiting the effectiveness of its orders within the Commission's discretion. But the legal limitations within which the Commission's powers are determined are as unchanging as the Constitution itself and to these limitations the doctrine of *stare decisis* applies immutably. That doctrine likewise applies to the legal rights of joint-mine operators, as defined by the Commission in the *Illinois case, supra.*

These rights to contract for transportation for which the Appellees contend are affirmatively granted to shippers by the language of the Interstate Commerce Act. Section 22, paragraph (1), (24 Stat. L., 379), guarantees the same rights to shippers against the carriers that they had at common law, and as heretofore pointed out, the sections of the law giving the Commission authority over the distribution of coal cars give it no power to limit the rights of shippers in the use of equipment greater than it has when the commodity transported is other than coal. The obligation of the carriers is placed severally upon each by the language of the Act. (See Section 1 of the Interstate Commerce Act, paragraphs 10 to 14, 41 Stat. L., 476.)

Constitutional Guaranties.

The right thus to contract with the second carrier for the transportation of the goods rejected by the first carrier is guaranteed by the Constitution of the

United States. It is provided by the Fifth Amendment of the Constitution of the United States that:

> "No person * * * shall be deprived of life, liberty, or property without due process of law, nor shall private property be taken for public use without just compensation."

And in the Fourteenth Amendment protection is given against the violation of these rights by a sovereign state.

This Court, in *Allgeyer* v. *Louisiana,* 165 U. S., 578, at p. 589, defined what is included and covered by these guaranties.

See also:

Lochner v. *New York,* 198 U. S. 45, at page 53.

Matthews v. *The People of the State of Illinois,* 202 Ill. 389.

Hitchman Coal & Coke Co. v. *Mitchell et al.,* 172 Fed. 963.

Opinion of the Justices, 220 Mass. 627.

In re Jacobs, 98 N. Y. 106.

Within both the liberty and property rights guaranteed by the Constitution is the right to make lawful contracts for the transportation of goods and to have such transportation. The right to deny transportation would in many cases amount to the right to destroy. In the case of a railroad the liberty to make lawful contracts of transportation is of the essence of any profitable use of the invested property and it is equally so in the case of a mine owner; but the right of any shipper to transportation is, under the cases which have been cited, within the protection of the Constitutional guarantees, and has been expressly held so to be in

Crescent Liquor Co. v. *Platt,* 148 Fed. 894 (C. C. N. D. W. Va., Goff, J.).

The common carrier's obligation to carry for all who offer, indifferently, raises in the public a correlative right to the service of the common carrier. That is a property right, guaranteed by the Constitution, and enforceable in the Courts.

Louisville & N. R. Co. v. *F. W. Cook Brewing Co.,* 223 U. S., 70.

United States v. *Louisville & N. R. Co.,* 195 Fed. 88.

Danciger v. *Wells, Fargo & Co.,* 154 Fed., 379.

Then again, the common carrier, in the performance of its public obligations, must use its facilities of shipment and carriage. The right to use property is itself "property" as defined by the Constitution, and if one be deprived of or restricted in the use of his property, even though he remain in full and complete possession and control thereof otherwise, his Constitutional rights are violated.

St. Louis v. *Dorr,* 145 Mo., 466.
Denver v. *Rogers,* (Colo.) 25 L. R. A. N. S. 247.
State v. *Charleston,* 112 S. E. Rep. 577.
Fruth v. *Board,* 75 W. Va., 456.

Yet the operation of Rule 4 as prescribed and required by the Commission to be made effective measureably restricts, limits, and in fact may prohibit the shipment of coal by the joint mine and the acceptance and the transportation of that coal in interstate commerce by these carriers. Thus the property of both joint mine and carrier is taken, not for a public use, but only to be applied to the increase of the service of mines not so favorably located as are the joint mines. And ac-

cordingly it is a taking without due process of law, it is contrary to the Fifth Amendment, and the Commission's order and requirement are void.

While Congress under the Constitution has exclusive power to regulate interstate and foreign commerce, and this power to regulate has been held in sundry cases to embrace the power to prohibit, the courts have repeatedly pointed out that the Constitutional power even in Congress to regulate commerce among the states, although plenary, is not arbitrary, and does not carry with it the right to destroy or impair those limitations and guaranties which are also embodied in the Constitution or in any of the amendments thereto.

> *U. S.* v. *Joint-Traffic Association*, 171 U. S., 505.
> *Monongahela Nav. Co.* v. *United States*, 148 U. S., 312.
> *I. C. C.* v. *Brimson*, 154 U. S., 447.
> *Hammer* v. *Dagenhart*, 247 U. S., 251.

In the case last cited this Court disposed of the contention that Congress had power to prohibit the movement of ordinary commodities, saying with reference to the power of Congress to regulate interstate commerce:

> "In other words, the power is one to control the means by which commerce is carried on, which is directly the contrary of the assumed right to forbid commerce from moving and thus destroy it as to particular commodities. But it is insisted that adjudged cases in this court establish the doctrine that the power to regulate given to Congress incidentally includes the authority to prohibit, the movement of ordinary commodities, and therefore that the subject is not open for discussion. The cases demonstrate the contrary. They rest upon the character of the particular subjects dealt with and the fact that the scope of governmental au-

> thority, state or national, possessed over them, is such that the authority to prohibit is, as to them, but the exertion of the power to regulate."

And after reviewing the cases the Court concluded that:

> "In each of these instances the use of interstate transportation was necessary to the accomplishment of harmful results."

Every case that we have found, in which a bar against the shipment in interstate commerce of a commodity has been upheld by the Court of last resort, has involved a commodity of such character that, for the protection of the public safety, health or morals, its production, sale, transportation in intrastate commerce or use for the purpose intended could be constitutionally prohibited and made a criminal offense under the police power. No attempt of Congress to restrain the interstate transportation of a commodity in itself harmless and not intended for an unlawful use has ever been upheld. Congress, in the present instance, has delegated its powers to regulate to the Interstate Commerce Commission under specific instruction which justifies no such use of the regulatory power as the Commission attempts by the prohibition here. To justify a prohibition of interstate commerce it must definitely appear that the traffic prohibited is in a commodity shipped with evil intent or that the transportation of it will accomplish harmful results. The necessities of modern life, fuel, clothing, and foodstuffs do not fall within this definition. They are neither evil in themselves nor can their free movement in interstate commerce produce harmful results, as those

words are used by makers and interpreters of the law. Certainly the Commission has not attempted to justify its action on any such theory.

Moreover, to come within the doctrine of those cases wherein the absolute prohibition of transportation in interstate commerce has been upheld, such prohibition must be complete as to the commodity involved. An order of the Commission can not authorize the carrier to which freight is offered to discriminate between shippers of a single commodity on its own line and escape condemnation as class legislation, also prohibited by the Constitution.

Connolly v. *Union Sewer Pipe Co.*, 184 U. S., 540.

Royal Brewing Co. v. *M. & K. T. Ry Co.*, 217 Fed, 146.

Matthews v. *The People of the State of Illinois*, 202 Ill., 389.

Crescent Liquor Co. et al. v. *Platt*, 148 Fed., 894.

Thus Rule 4, being invalid if put into effect by the railroads voluntarily, is also invalid when put into effect by the order, direction or permission of the Commission.

See also:

Interstate Commerce Commission v. *Baltimore & Ohio Ry Co.*, 145 U. S., 263.

Interstate Commerce Commission v. *Cincinnati, N. O. & T. P. R. Co.*, 167 U. S., 479.

Southern P. Co. v. *Interstate Com. Commission*, 200 U. S., 536.

Commission's Conclusions.

The language of the Commission in its conclusions in the Bell & Zoller decision does not avoid the legal

limitations within which its administrative discretion must be confined. It seeks apparently to avoid passing upon the legal limitations of its jurisdiction that were raised by the appellees.

What the Commission finds, and seemingly finds objectionable and what it seemingly considers a justification of Rule 4, is stated by the Commission thus:

> "The superior advantages of the joint mine over its local competitor * * * have resulted in a proportionately greater development of the industry at points where mines may be served by two or more carriers rather than by one."
>
> "A duplication of trackage and of trackage rights has followed in numerous instances."
>
> "There has been extreme dissatisfaction in the ranks of mine labor, accentuated, in any event by irregularities in opportunities for working time and wages."
>
> "The results of such disturbed labor conditions have been harmful to the carriers and shippers." (Transcript No. 627, p. 41.)

It may well be doubted that the power to regulate interstate commerce, lodged in the Congress, is synonymous with the police power of the state. But whatever the fact be as to that there would seem to be no doubt that the Interstate Commerce Act does not constitute the Interstate Commerce Commission as the guardian of the public health, the public safety, or the public welfare. It may be that the development of great industrial and distributing centers is economically undesirable. It is not clear that duplication of trackage rights is an evil *per se*. The Commission has certainly not so held in the past. The Court may profitably consider in this connection the Commis-

sion's action in a series of related cases reported simultaneously with or shortly after the *Fairmont & Cleveland case, supra,* and all cited in the brief of the appellant local mine operators herein at page 72. They are:

Ridge Coal Mining Co. v. *M. P. R. R. Co.,* 62 I. C. C., 259.

Dering Mines Co. v. *Director General,* 62 I. C. C., 265.

Hillsboro Coal Co. v. *C., C. & St. L. Ry Co.,* 63 I. C. C., 401. Reopened and reaffirmed 81 I. C. C., 216.

Benton Coal Mining Co. v. *C., B. & Q. R. R. Co.,* 63 I. C. C., 396.

Franklin County Mining Co. v. *C. B. & Q. R. R. Co.,* 63 I. C. C., 396.

Cameron Coal Co. v. *M. & E. R. R. Co.,* 63, I. C. C., 434.

In these cases the Commission did, as that brief points out, find that the joint mines had certain advantages, in the matters of routes and car supply particularly, over the local mines, but, said the Commission:

> "Upon a careful consideration of the question presented in the light of the evidence of record we conclude that the mines of complainant's competitors which are given a joint status by reason of the Burlington serving them under trackage agreements are in the same category as junction-point mines; that there is no logical distinction between the two; that the actual or constructive location of the competing mines upon two or more lines of railroad substantially differentiates their situation from that of the complainant's local mine; and that the preference and advantage over the complainant which such competing mines

enjoy by reason of service by two or more lines, is not undue."

(*Ridge Coal Mining Co.* v. *M. P. R. R. Co., supra,* at p. 262.)

It may be unfortunate that labor enjoys more even working time in some mines than in others. Those, however, are not matters entrusted to the administrative regulation of the Interstate Commerce Commission. And it may be noted that the greater claims of the common point, served by more than one carrier, over the local point, served by an individual railroad, have always and consistently been recognized.

Interstate Commerce Com. v. *Diffenbaugh,* 222 U. S., 42-47.

Southern P. Co. v. *Interstate Commerce Com.,* 219 U. S., 433-452.

Interstate Commerce Com'n. v. *Cincinnati, P. & V. R. Co.,* 124 Fed., 624.

Interstate Commerce Commission v. *Western & A. R. Co.,* 88 Fed., 186.

Interstate Commerce Commission v. *Louisville & N. R. Co.,* 73 Fed., 409.

Commodity Rates to Pacific Coast Terminals, 32 I. C. C., 611.

Bowling Green Business Men's Asso. v. *L. & N. R. R. Co.,* 31 I. C. C., 1.

Lebanon Commercial Club v. *L. & N. R. R. Co.,* 28 I. C. C., 301.

Indianapolis Freight Bureau v. *C. C. C. & St. L. Ry. Co.,* 16 I. C. C., 277.

But the Commission rests its order upon two other findings than those quoted above, as follows:

"The practice indicated in the *Illinois case* seems, in certain instances, to result in a waste of

car-days which in view of the effects of recent and present car shortages should be avoided."

And:

"Whatever tends to inflate the nominal mine ratings beyond the amount which can normally be produced and shipped is distinctly counter to the public interest."

These matters are within the administrative discretion of the Commission and its conclusions with regard to them would be final to justify some sort of regulation if they were not in fact contrary to the findings of the Commission or reached under a mistake of law. The finding of the Commission with regard to the wastage of cars was set out in the report of the Commission in the *Fairmont & Cleveland case, supra,* shown on page 30 in Case No. 627, as follows:

"During 1920 cars left over at local mines on the Chesapeake & Ohio averaged 8.2 per cent of cars placed, while those left over at joint mines in the New River district averaged 11.4 per cent. The left-overs on the Virginian at joint mines were slightly in excess of the left-overs at local mines, due in part to the physical conditions on what was formerly the White Oak Railway. The Virginian operates over that line only in the daytime, and efforts are made to get sufficient cars to the mines the night preceding for the commencement of operations the following day. If cars are placed too late in the afternoon to be loaded they are reported as being left over. A witness for the Chesapeake & Ohio testified that the question of left-over cars was largely a matter of policing, and that if proper information were given to each railroad regarding the order

and supply of cars there would be no occasion for cars being left over at joint mines to a greater extent than at local mines. This witness testified that rule 4 is defective in that it does not require that all lines serving joint mines be supplied with such information as would make over-ordering impracticable, and thus make full utilization of the empty equipment available from day to day.

"The complainants concede that the railroads should exchange such information as will enable them to police left-over cars, and that very few joint mines have trackage facilities greater than their capacity to ship. No difference appears in this record in the latter respect between joint and local mines."

On the strength of that finding as to the facts, the Commission, in the *Fairmont & Cleveland case, supra,* required that Rule 4 be canceled and the Illinois rule established. Then, in the *Bell & Zoller Case, supra,* the Commission reaffirmed that finding as to the facts, except in respect to a few words better eliminated or changed, in the light of the Commission's reversal of conclusion. Compare transcript No. 627, page 30, and page 39.

The Court will observe that on the Virginian the left-overs resulted from empty cars being placed too late in the day to be loaded. Such left-over cars certainly result from no fault of the mine, and the Commission finds at any rate that at joint mines they are only slightly in excess of the left-overs at local mines. To whatever extent left-overs existed at Chesapeake & Ohio mines the Commission finds they result from a deficiency in Rule 4, the very rule the Commission now requires shall be established. On the other hand, the Commission also finds that left-overs can be avoided

by proper policing and full utilization of all car supply thereby secured. The Commission's conclusions on this point are, therefore, directly contrary to its findings of fact.

With respect to the conclusion that the rule laid down by the *Illinois case, supra,* has a tendency to inflate the ratings of joint mines in times of car shortage, the Court's attention is directed to three propositions:

(1) That the rating of the mines was not an issue before the Commission;

(2) That the conclusion is at variance with the fact found by the Commission in the *Bell & Zoller case, supra:*

> "The evidence indicates that in times of car shortage mine ratings, *both local and joint,* becomes inflated an average of 33 1-3 per cent." (Italics ours.)

(3) That the conclusion is at variance with the conclusion in regard to mine labor.

Assuming that the ratings become inflated, as the Commission says, because of the shortage, it is entirely inconsistent to conclude that the joint mine can *at the same time* work more steadily than the local mine, and inflate its ratings more than the local mine. For, if the working time is more steady in the joint mine, it has less opportunity to inflate its ratings than has the local mine. And the Court will note that in the *Bell & Zoller case,* as quoted, *supra,* the Commission finds the inflation of ratings the same at both joint and local mines. Furthermore, while the mine ratings used were not before the Commission in the *Fairmont & Cleveland* or *Bell & Zoller cases,* the Commission found in the *Bell & Zoller case:*

> "The present decision is of course without prejudice to such determination of the questions before us in the general proceeding indicated as involving the mine rating and car-distribution rules as the record may there require."

If there be anything wrong with the mine rating rules it is not shown by the findings of the Commission above quoted, and the place to correct it is not in a proceeding which involves only the distribution rules, unless it be properly brought in issue upon the evidence adduced to support the conclusion reached. Certainly the facts found in the *Fairmont & Cleveland* and *Bell & Zollner cases* support the opposite conclusion from that reached by the Commission, *and its first conclusion on those facts, was opposite.*

The appellees insist that whatever basis of rating determines the capacity of mines, local or joint, to ship, the distribution of cars based on the rating is required by paragraph (12) of Section 1, and that the rating having once been determined no discrimination between local and joint mines by either carrier is permitted under the statute.

But if the Court should determine that the rating rules are material, its attention is called to the language of those rules whereby it will be shown that the rating of the joint mine would be exactly the same if each carrier rated the joint mine in accordance with the shipments made via its line.

Thus a local mine that has produced 62,500 tons in the preceding month under the rule, working to produce the same 200 hours in the month, would under the calculations of the rating rule produce 312.5 tons per hour. This quotient, multiplied by 8, would give the rating to the mine of 2,500 tons per day, or 50 cars. A joint mine of the same capacity producing in the

aggregate in the same month 62,500 tons and shipping 25,000 tons by one carrier and 37,500 by the other, would work the same aggregate number of hours, but it would work only 80 hours in producing 25,000 tons shipped by the first carrier and 120 hours to produce the 37,500 tons shipped by the second carrier; 25,000 tons divided by 80 gives the same production per hour, or 312.5 tons, or 50 cars per day, as the local mine of the same capacity has, or as the joint mine has by using its aggregate loadings from the two carriers. The tonnage loaded to the second carrier in 120 hours would also give a rating on that carrier of 50 cars per day. It is thus seen that the rating of the joint mine is not changed by the fact that it is called a gross daily rating and computed so as to rate the mine the same on both lines. It gains no advantage in rating in this manner, or, as found by the Commission:

> "A rating (of a local mine) so determined is called the daily rating, as distinguished from the gross daily rating which applies to a joint mine, *and which is determined in a similar manner*, but by taking the total tonnage shipped over the lines of all the carriers serving the mine."

Assignments of Error as to Effect of Decree of District Court.

Exception XI of the Government is that the District Court erred in substituting its judgment for the judgment of the Interstate Commerce Commission concerning a regulation pertaining to the distribution of cars for the transportation of coal in interstate commerce. Exception in almost identical language is taken by the appellees in Case No. 628 in their excep-

tion XIII. These exceptions disregard the language used by the District Court and the legal effect of its order. The concluding paragraphs of the opinion of the Court, page 58 of the printed appeal, are as follows:

> "We mean only to hold that Circular CS-31, rule 4 (revised), and the action of the carriers in putting it in force, is erroneous, and must be enjoined and suspended.
>
> "The order will be entered without prejudice to the Interstate Commerce Commission making proper orders relative to reasonable car distribution, to joint as well as local mines, not in conflict with the views hereinbefore expressed."

The Court has, by its decision and order, in no sense substituted its judgment for that of the Commission on any question that is within the administrative discretion of the Commission. The effect of the order of the District Court was merely to set aside Rule 4, as being in excess of the statutory powers of the Commission, arbitrary and in violation of transportation rights of the appellees. The issue raised by the bill was as to whether Rule 4 is an encroachment on the appellees' lawful rights and should be set aside. The Court kept strictly within the issue in this regard, and the effect of the decree was automatically to restore the application of the rule laid down by the Commission in the *Illinois case, supra,* and again in the *Fairmont & Cleveland case, supra.* If the Court erred at all in this regard it was in failing to define to the Commission the legal limitations within which it might exercise its administrative discretion. The appellees contend that their legal rights are defined in the rea-

soning of the *Illinois case,* as set out at pages 26 *et seq.* herein, and that the Commission may exercise its discretion only in the area between the rule suggested by the reasoning of the *Illinois case* and reiterated in Commissioner Potter's dissent in the *Bell & Zoller case,* on the one hand, and the 200 per cent rule for which the appellees contended before the Interstate Commerce Commission on the other hand. The appellees insist that the decision and decree of the District Court left the Commission free to lay down such rule as it saw fit within these legal limitations.

Assignment of Error as to Form of Decree.

The Government's Exception XII to form of decree, also contained in Exception XIV in Case No. 628, is not insisted upon on brief. Equity Rule 71, referred to in the assignment of error, is identical with former Equity Rule 86. This rule came before this Court for consideration in the case of *Putnam* v. *Day,* 22 Wallace, 60. See also *McClaskey* v. *Barr,* 48 Fed., 130; *United States* v. *Goldstein,* 271 Fed. 838. If any of the matter objected to should not have been included in the decree, its inclusion affords no ground for reversal of the decree if the final conclusion reached by the Court in the case was sound, but it is ground merely for an order to modify the decree by eliminating any recitals which were not appropriately included.

Other Assignments of Error in Case 628.

There have been discussed heretofore herein all of the exceptions to the decree of the lower court filed

by the Government and the corresponding exceptions filed by the appellant coal operators. Of the remaining ten exceptions filed by the latter, XVII and XIX raise no question that has not heretofore been discussed. Exception XVI covers an inadvertent misconstruction of Rule 4 by the District Court in a matter which has no bearing upon the issues raised in this proceeding, either in the District Court or here.

Exception XV is:

> "That the said District Court erred in finding that under Rule 4 of Circular CS-31 Revised, a joint mine stands in no better position than a local mine."

This finding by the Court is merely a repetition of the finding made by the Commission with respect to the effect of the application of Rule 4, both in the *Fairmont & Cleveland case, supra,* and in the *Bell & Zoller case, supra.* In the former case, after reciting in detail the effect of the order, the Commission held:

> "While it is true that the joint mine has an advantage by reason of its location on two railroads because of the additional markets which it can reach, it is likewise true that the joint mine is not always in a position to avail itself of its alleged advantage because of the practice in the coal business to make contracts for yearly periods beginning with April 1. Neither is it possible at all times for the joint mines to order all their cars from the carrier having the greater car supply, as its contracts may also require shipments to be made by the line having the lesser car supply in order to meet its current obligations. It frequently happens that the joint mine receives a less car

> supply than the local mine situated on the road having the greater car supply."

And in that case also the Commission concluded that Rule 4 was unreasonable and unduly prejudicial to joint mines and unduly preferential of local mines.

Again, in the *Bell & Zoller case, supra,* the Commission set out the effect of the rule in detail and found:

> "Should the joint mine order more than half its cars from the carrier with the greater car supply this will change the figures somewhat, but *in no instance will the joint mine receive as many cars as the local mine served by carrier A if the orders are divided.*" (Italics ours.)

The rule, by its terms, provides that if a joint-mine shipper orders 100 per cent of its rating from one carrier and is served only with a percentage of cars sufficient to carry a part of the goods, the part rejected cannot be even offered for shipment to the second carrier.

Appellant coal operators' Exceptions XVIII, XX, XXI and XXII raise questions so closely related as properly to be discussed together. They revolve around the proposition contained in the XVIII exception:

> "It is insisted that no joint mine has a right to transportation or to receive cars for transportation unless it makes an actual or constructive tender of sufficient coal to load the number of cars ordered, and, as the daily rating of a joint mine presents its maximum capacity to tender coal for shipment, it also represents its maximum capacity to make reasonable requests for cars."

The contention of the appellants, as we understand it, is that the ordering of cars lies wholly within the administrative functions of the Commission, and the request for cars from the second carrier is an unreasonable request for transportation within the meaning of Section 1 of the Interstate Commerce Act because it is not seasonably made. This contention is based upon the proposition that when the shipper orders cars from road "A" on Monday for Tuesday's loading, it thus makes a tender of all of its coal and must keep that tender intact until the cars are supplied, and that when the cars are supplied by "A" it is too late to make an order for Tuesday's loading on road "B."

It is to be noted that the appellant coal operators do not here controvert the merit of appellees' claim that they have the right to ship by carrier "B" coal not taken by carrier "A," but endeavor to show that the appellees have been successfully cut out of any effective exercise of this right by rules of the Commission as to when cars shall be called for. If this were so it would only establish the unreasonableness and invalidity of the rules so adopted, but it is not so.

It is clear that when the order for cars for Tuesday's loading is accepted on Monday, that constitutes a contract for the carriage of such coal as may be loaded in the number of cars agreed to be furnished. The Commission, in the *Illinois case, supra*, found that the carrier should announce on the day previous to the placement the proportionate share of cars which it will be able to furnish. The balance of the shipper's offer of such coal is rejected by carrier "A" on Monday afternoon and is, therefore, available at that time for offer for Tuesday's loading to carrier "B."

When, on the operator's request on Monday for cars

for the operator's full mine rated output, the carrier agrees, on account of a short car supply, to furnish only a portion of the cars requested, the contract is closed and the obligation is reciprocal for the carrier to furnish the number of cars agreed to be furnished and no more, and for the operator to furnish the amount of coal to fill those cars and no more. This contract is followed by the actual tender on the following day, but the cars come to the coal and not the coal to the cars; the tender is only of the number of cars which the carrier has agreed to furnish and requires the furnishing by the operator only of the amount of coal required to fill them. The carrier has no right or interest beyond this.

That there is the legal right to thus contract for the supplying of cars and that the making of such contract determines reciprocally the rights and obligations between the parties is well established by decisions in various jurisdictions.

Clark v. *Ulster & Delaware R. R. Co.*, 189 N. Y. 93.
Texas & P. Ry. Co. v. *Nicholson*, 61 Texas 491.
Easton v. *Dudley*, 78 Tex. 236.
Pittsburgh C. C. & St. L. R. Co. v. *Racer*, 5 Ind. App. 209.
Rudolph v. *Wagner*, 36 Ala. 698.
Fremont Canning Co. v. *R. R. Co.*, 180 Mich. 283.
Chattanooga So. R. R. Co. v. *Thompson*, 133 Ga. 127.
Grimes v. *Lake Erie & W. Ry. Co.*, 143 Ill. App. 532.
Wood v. *Chi. M. & St. P. Ry. Co.*, 68 Iowa 491.
Baker v. *The K. C. St. J. & C. Ry. Co.*, 91 Mo. 152.
Outland v. *R. R. Co.*, 134 U. S. 350.

These cases settle the proposition that when a contract for carriage is thus complete there is no burden upon the shipper to hold its goods for a physical tender at the time the cars are supplied. The rejection of part of the shipment in advance is a waiver by the carrier of any physical tender from the shipper beyond the goods sufficient to complete the contract theretofore entered into at the time of offer and acceptance. As stated in *Texas & P. Ry. Co.* v. *Nicholson, supra:*

> "A tender is rendered unnecessary where the party proposing it is informed in advance that it will be useless and will not be accepted."

The rule contended for by the appellant coal operators would be subversive of all present-day business practices, and would, in addition, have the effect of making a way station of every competitive railroad point. This is illustrated most potently in the case of a shipment of perishable food products. Take the case, for example, of a dealer in fresh fish or early vegetables, where in every case the shipments must be prepared for immediate shipment. A shipper of fresh fish may be assumed to prepare his shipments on a wharf not connected with any railroad siding such as at Boston, for easy illustration. Having a catch amounting to three carloads of fish to be prepared for shipment on the following day, he calls up the agent of the Boston & Maine Railroad and states that he has three cars of fish for shipment to Cincinnati. The agent of the Boston & Maine advises that on account of shortage of cars he can only take one carload. The shipper thereupon calls up the agent of the Boston & Albany and states that he has two carloads of fish for ship-

ment to Cincinnati on the following day. The agent of that line advises that he can only take one. Thereupon the shipper orders the third car from the New York, New Haven & Hartford and is given a car by that line. Note that at the time of making these respective contracts of carriage the shipper has not prepared or iced his shipments, which he thereupon prepares to do and ships the three cars on the following day by the three carriers. If, when he had offered the three cars to the Boston & Maine and had been advised that only one car was available, it was necessary for him to hold the other two cars until the one car had been furnished on the following day by the Boston & Maine, the fish dealer at Boston would have lost the advantage of his location at that competitive point, and the two carloads which had been rejected by the Boston & Maine would be a complete loss to him.

Illustration after illustration might be given to illumine the impracticability of the rule of law contended for. Business is not, and cannot, be conducted at the present time upon any such theory.

Appellant coal operators' Exception XXIII is as follows:

> "That the said District Court erred in not holding that the question whether the aggregate daily rating of a joint mine to order cars from one or both of the carriers serving it shall be measured by its gross daily rating or capacity to produce and tender coal for shipment is a just and reasonable or unjust and unreasonable rating, is one within the administrative functions of the Interstate Commerce Commission and not subject to review by the District Court."

No question of the reasonableness of the rating of a joint mine or local mine was before the Commission or before the Court. The appellant coal operators are foreclosed by their answer from raising this question, either in the court below or here. The bill of complaint alleges, Paragraph IX:

> "The ratings of all mines under said rules represent, for purposes of car distribution, the daily capacity of the mines to produce and ship coal."

It is admitted by the appellant coal operators, both by their motion to dismiss and by the specific admission of the answer, in paragraph III thereof:

> "Intervening defendants admit that the ratings of all mines under the rules now maintained by the said railway defendants represent, for purposes of car distribution, the daily capacities of the mines to produce and ship coal."

The proposition raised in these proceedings is that the Commission is without power to permit by Rule 4 the denial to the appellees of the right to ship that part of their daily capacity to produce and ship coal by the second carrier which has been rejected by the first.

The finding of the Commission has been made on the subject of the rating in the *Bell & Zoller case, supra,* in the following language:

> "The rating of a local mine is determined by taking the total tonnage shipped by the mine during the preceding month over the carrier serving the mine, dividing it by the number of hours worked in producing it, and multiplying the quo-

tient by the number of hours in the recognized workday (not more than 10 hours) of the individual mine. A rating so determined is called the daily rating, as distinguished from the gross daily rating which applies to a joint mine, and which is determined in a similar manner, but by taking the total tonnage shipped over the lines of all the carriers serving the mine."

The sole question before this Commission and the Court is whether, having a capacity to ship of a certain amount fixed by the rating, the carriers or the Commission have a right to deny rights to transportation of the capacity determined under the rating rules.

It is not clear why the appellants should think there was any burden upon the District Court to rule on the question of ratings. The question was not in issue before the Court; the Commission had found that the ratings of the joint mines were determined in the same manner as those of the local mines; the whole question of ratings was an open one before the Commission in another proceeding, and the effect of the order of the District Court was properly to leave that question for determination in the first instance by the Commission, if, indeed, it could be held to be an open question at all.

Appellant coal operators' Exception No. XXIV:

"That the said District Court erred in not holding that a rule which limits the daily orders for cars of a joint mine to 100 per cent of its gross daily rating on both the carriers serving it is required by paragraph 12 of Section 1 of the Interstate Commerce Act."

This question was raised before the Commission and was thus disposed of:

> "Interveners further contend that the first sentence of paragraph (12) of Section 1 requires every carrier, during periods of car surplus, to make a just and reasonable distribution of cars among the mines served by it or customarily dependent upon it for car supply, and leaves the question of what is a just and reasonable distribution of cars to the discretion of the carrier or to us upon complaint and after full hearing, while the second sentence of paragraph (12) specifies the particular manner in which the cars are to be distributed during periods of car shortage and leaves nothing regarding the distribution either to the discretion of the carrier or to us. This sentence does not use the term 'distribution,' but interveners argue that to maintain and apply just and reasonable ratings and to count each and every car furnished to or used by any such mine for transportation of coal against the mine is a mandatory rule of law requiring an exact pro rata distribution of cars in accordance with the prescribed ratings, whether the mine be served by one or more carriers. In view of our conclusions herein, and because the interpretation of paragraph (12) is before us in another proceeding now pending, we will not pass upon that contention here."

The Commission has exhaustively considered the effect of paragraph (12) of Section 1 in other proceedings.

Assignment of Freight Cars, 57 I. C. C., 760.
Assigned Cars for Bituminous Coal Mines, 80 I. C. C., 520.

In both of these cases the Commission reached the conclusion:

> "The Commission is of opinion that paragraph (12) of Section 1 of the interstate commerce act does not change the rule of law laid down in the *Hocking Valley and Traer cases, supra.* The paragraph states in statutory form that which had theretofore been the law, pursuant to the decisions of the Commission and of the Supreme Court of the United States."

Again in the *Assigned Car Case, supra,* the Commission said:

> "While, in the expression of the rule which originated in the *Hocking Valley* and *Traer cases,* the words 'count against the mine' were continually being applied as a necessary term in the formula, it was always recognized that the rule with these words in it was not the equivalent of a requirement for equal proportionate distribution of cars assigned and unassigned to coal mines."

As hereinbefore pointed out, this paragraph of the law, if it has any bearing on the case here in issue, is a direct mandate to the Commission to continue the obligation of the carriers, as it had been before, as a several and not a joint obligation. The language of the statute is directed severally to the carriers. When the coal rejected by the carrier to which it is first offered is offered for shipment to the second carrier, that carrier is required to make a proportionate distribution of its cars in connection with the offers that are received by it from other mines which it serves. We have discussed this proposition in detail earlier in the brief and will not repeat that discussion here.

Nor is the language of paragraph (12) of Section 1 at all inconsistent with this view. That for which the appellees contend is that the cars furnished by the

first carrier to which their coal is offered shall be counted against the rating in order to determine the capacity of the mine to ship over the second carrier and the distributive share which that carrier, is obligated to furnish.

So far from being opposed to the contention of the appellees, the language of paragraph (12) of Section 1 appears rather to support the contention made by the appellees before the Interstate Commerce Commission, namely, that the mine being once rated by each carrier, each carrier was under the obligation to furnish it a proportionate share of cars based on its full rating. The language of the paragraph does not require the carriers to count against the rating cars furnished by another carrier, but it is pefectly consistent with the language of the section that the only cars in contemplation by the section are the cars available to each carrier, and that therefore the requirement that the cars be counted applies only to the available cars of the particular carrier which is determining the supply which it shall furnish.

CONCLUSION.

For the reasons hereinbefore stated and on the authority of the cases cited, the appellees rest confident that the decision and decree of the District Court for the Southern District of West Virginia will be affirmed by this Honorable Court.

Respectfully submitted,

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Counsel for Appellees.

UNITED STATES AND INTERSTATE COMMERCE COMMISSION *v.* NEW RIVER COMPANY ET AL.

SLAB FORK COAL COMPANY ET AL. *v.* NEW RIVER COMPANY ET AL.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA.

Nos. 627 and 628. Argued April 24, 1924.—Decided June 9, 1924.

1. An order of the Interstate Commerce Commission, in form dismissing a complaint of shippers but the effect of which was to require the observance of a rule of car distribution attacked in the proceedings as arbitrary, illegal and unconstitutional, *held* not a "negative" order, (*Procter & Gamble Co.* v. *United States*, 225 U. S. 282, distinguished,) and reviewable in the District Court. P. 539.
2. The courts cannot substitute their judgment for the findings and conclusions of the Commission made within the scope of its power to regulate the distribution of coal cars. P. 541.
3. A rule fixing the number of cars distributable to coal mines in proportion to the daily capacity of each to produce, *held* not arbitrary, unreasonable, or violative of due process, as applied to mines served by more than one carrier. P. 542.

293 Fed. 460, reversed.

APPEALS from a final decree of the District Court enjoining the enforcement of an order of the Interstate Commerce Commission respecting distribution of coal

cars. The suit was brought by the New River Company and other coal mine operators, (appellees), against two railroad companies, the United States and the Commission. Other coal operators intervened to defend the order. The United States and the Commission took one appeal, and the interveners another. The carrier defendants abstained.

Mr. Blackburn Esterline, Assistant to the Solicitor General, with whom *Mr. Solicitor General Beck* was on the brief, for the United States.

Mr. George T. Bell for appellants in No. 628.

Mr. James W. Carmalt, with whom *Mr. Addison C. Burnham* and *Mr. August G. Gutheim* were on the brief, for appellees.

Mr. J. Carter Fort, with whom *Mr. P. J. Farrell* was on the brief, for the Interstate Commerce Commission.

MR. JUSTICE BUTLER delivered the opinion of the Court.

This suit was brought by the appellees against the Chesapeake & Ohio Railway Company and the Virginian Railway Company, competing interstate carriers by railroad, the United States and the Interstate Commerce Commission to enjoin the carriers from applying a certain rule (Rule 4 of Circular CS-31, Revised) for the distribution of coal cars and to set aside the decision and order of the Commission of December 11, 1922, in certain proceedings instituted by the appellees against the defendant carriers.

For convenience, a mine served by one carrier is called a "local mine", and a mine served by two or more carriers a "joint mine". Each appellee is the operator of a joint mine served by the defendant carriers, and each appellant mining company is the operator of a local mine

served by one or the other of the carriers. The car service rules were promulgated to govern uniformly the "ratings" of coal mines, other than anthracite, and car distribution to such mines during periods of car shortage. The daily rating of a local mine for any month is based on its tonnage shipped during the preceding month, and is identical with its daily capacity to produce coal. The rating of a joint mine is calculated in the same way that the daily rating of a local mine is determined, except that its shipments over all carriers serving it are considered in determining its total capacity to produce coal. The figure so ascertained is called the "gross daily rating," in recognition of the fact that the rating of a joint mine does not represent its capacity to ship over each carrier on days when it uses more than one, but on the contrary represents its total daily capacity to ship over all lines which serve it. Rule 4 provides: "Copies of orders for cars for a mine that is joint with any other carrier (steam, electric, or water) shall be filed with a designated representative of each such carrier. Such combinations must not exceed the gross daily rating of the mine". Under the rules, when a mine orders less than its rating, distribution to it is on the basis of its orders.

These rules were established during the period of federal control of the railroads. After the expiration of that period, the Commission issued a notice, dated March 2, 1920, recommending to carriers and shippers that the rules be continued in effect until experience and further study demonstrated that others would be more effective and beneficial. They were continued by carriers generally. July 8, 1920, the Chesapeake & Ohio Railway Company and the Virginian Railway Company asked for permission to discontinue rule 4 and to substitute for it the "150 per cent. rule", which the Commission in 1912 had found to be a reasonable rule for the Illinois Central Railroad Company (*In re Irregularities in Mine Ratings*, 25

I. C. C. 286, 295), but which had never been followed by the railroads generally or by the defendant carriers. Under this rule, a joint mine may order 100 per cent. of its gross daily rating from either carrier serving it and is entitled to receive its pro rata share of that carrier's available cars. If it so orders, it is not entitled to any cars from the other carrier. In this respect it does not differ from rule 4. However, if a joint mine served by two carriers orders cars from both on the same day, it is entitled to order from each carrier 75 per cent. of its gross daily rating, making its combined orders 150 per cent., but subject to the limitation that it is not entitled to receive in the aggregate more than its gross daily rating. The Commission declined to give permission to substitute the 150 per cent. rule for rule 4.

January 11, 1921, appellees filed separate complaints with the Commission against the Chesapeake and Ohio Railway Company and against the Virginian Railway Company, attacking rule 4 as unjust and unreasonable and unduly prejudicial to joint mines and unduly preferential of local mines. Certain operators of joint mines intervened in support of the complaints. Certain operators of local mines intervened in support of rule 4. The complaints were consolidated with each other and with similar complaints. June 21, 1921, Division 5 of the Commission reported as follows: ". . . We find that rule 4 of Circular CS-31, Revised, is unreasonable and unduly prejudicial to joint mines and unduly preferential of local mines, to the extent that it limits the aggregate orders of the joint mine to 100 per cent. of its rating from both roads; and that for the future during periods of car shortage defendants should distribute cars to the joint mines on their lines here considered on the basis outlined in the Illinois Case [*In re Irregularities in Mine Ratings, supra*] . . ." *Fairmont & Cleveland Coal Co.* v. *Baltimore & Ohio R. R. Co.*, 62 I. C. C. 269, 276. The Com-

mission referred to its authority under § 1 (13) of the Interstate Commerce Act by general or special orders to require carriers by railroad to file their rules and regulations with respect to car service, and to direct that such rules and regulations be incorporated in the schedules showing rates, fares and charges for transportation, and be subject to the provisions of the act relating thereto; and added, "We have not required that car service rules be filed as tariff schedules. We will not in this proceeding direct that the rules which we herein find to be reasonable be so filed. We shall expect, however, that defendants will promptly amend their car service rules so as to conform with our findings and evidence same by filing copies thereof with us." No formal order was entered, but the defendant carriers amended their rules to conform to the findings in the report, and put in force and applied the 150 per cent. rule.

Subsequently, on petition of the intervening operators of the local mines, the case was reopened and considered by the full Commission. December 11, 1922, it reversed the findings of Division 5 and found that rule 4 was not unreasonable or unduly prejudicial. *Bell & Zoller Coal Co.* v. *Baltimore & Ohio Southwestern R. R. Co.*, 74 I. C. C. 433. It said: "Our former conclusions in the Fairmont Case, based upon a mistaken adherence to and extension of the decision in the Illinois Case, are reversed." The Commission made a formal order, reciting that it had "made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof: It is ordered, That the complaints in these proceedings be, and they are hereby, dismissed." Following the report and order, the Chesapeake & Ohio Railway Company and the Virginian Railway Company gave notice to the appellees that they would put rule 4 in effect again.

Thereupon this suit was brought. The complaint alleged that the carriers put the rule in effect because of the order of the Commission, and in fear of the penalties imposed by law for violation of its orders. It attacked the order and rule on the ground that they are beyond the power which the Commission can constitutionally exercise; and are in excess of the power conferred upon it by statute; and that they are arbitrary and unreasonable. The Chesapeake & Ohio Railway Company answered that the effect of the order upon it was necessarily the same as though the order had been in affirmative form, requiring it to cease and desist publishing and observing the Illinois rule (150 per cent. rule) and in lieu thereof to publish and observe rule 4; and that, facing the danger of suits for heavy damages, supported by a decision and reparation orders which it believed would follow its failure to observe the rule prescribed by the Commission, it undertook to cancel the existing rule and to restore rule 4. The Virginian Railway Company answered that in the matter of distribution of cars, it was subject to the orders of the Commission, and that the Commission having decided that rule 4 is not unreasonable or unduly prejudicial, and in the same decision having expressly reversed its conclusion in the *Fairmont Case*, that company considered itself legally bound to put rule 4 in effect on its railroad. The United States and the Interstate Commerce Commission moved to dismiss the complaint for want of jurisdiction and want of equity. The interveners moved to dismiss and later answered.

The case was presented to and heard by a court of three judges. Act of October 22, 1913, c. 32, 38 Stat. 220. The operation of the order of the Commission was stayed and suspended. After trial, final decree was entered setting aside the Commission's order and rule 4 and enjoining the United States, the Commission and the defendant carriers from restricting the rights of appellees in accord-

ance with the order and rule or through any other order or rule to the same effect. 293 Fed. 460. The United States and the Interstate Commerce Commission appealed. No. 627. The interveners appealed. No. 628. The carriers did not appeal.

The questions for decision are: Whether the order was subject to review by the District Court; and, if so, whether it should be set aside.

1. The District Courts have jurisdiction over "cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission." Act of June 18, 1910, c. 309, 36 Stat. 539; Judicial Code, § 207, Act of March 3, 1911, c. 231, 36 Stat. 1148; Act of October 22, 1913, c. 32, 38 Stat. 219. The appellants contend the order is negative and therefore not subject to review by the court. They cite *Procter & Gamble Co.* v. *United States,* 225 U. S. 282; *Hooker* v. *Knapp,* 225 U. S. 302, and *Lehigh Valley R. R. Co.* v. *United States,* 243 U. S. 412. In the first of these cases, application was made by the Procter & Gamble Company, a shipper and owner of tank cars, to be relieved from paying demurrage charges, in accordance with demurrage rules applied by the carrier. The Commission dismissed the complaint. As shown by the report (19 I. C. C. 556, 560), the reason for dismissal was that the tank cars were made subject to the demurrage rules, by an arrangement between the shipper owning the cars and the carrier hauling them. The question before this Court (p. 292) was whether the Commerce Court had power to exert its own judgment by originally interpreting the administrative features of the Act to Regulate Commerce, and upon that assumption to treat the refusal of the Commission to grant the relief prayed for as an affirmative order, and accordingly to pass on its correctness. *Hooker* v. *Knapp* and *Lehigh Valley R. R. Co.* v. *United States* were decided on the authority of the *Procter & Gamble Case.*

The opinion in that case, when viewed in the light of the report of the Commission, furnishes no support for appellants' contentions here. In all of these cases, affirmative relief sought was denied by the Commission. Judicial review was refused on that ground. The taking of jurisdiction in such cases would involve determination by the courts whether relief denied by the Commission, in the exercise of its powers, should be granted. See *The Chicago Junction Case*, 264 U. S. 258. The authority conferred upon the Commerce Court by § 207 of the Judicial Code was vested in the District Courts by the Act of October 22, 1913, and, like the authority previously exercised by the Federal Circuit Courts, is confined to determining whether the Commission's order violates the Constitution, or exceeds the power delegated by statute, or is an exercise of power so arbitrary as virtually to transcend the authority conferred. *Kansas City Southern Ry. Co.* v. *United States*, 231 U. S. 423, 439; *Manufacturers Ry. Co.* v. *United States*, 246 U. S. 457, 483, 489. See also *Interstate Commerce Commission* v. *Illinois Central R. R. Co.*, 215 U. S. 452, 470; *Interstate Commerce Commission* v. *Union Pacific R. R. Co.*, 222 U. S. 541, 547; *Intermountain Rate Cases*, 234 U. S. 476, 490; *Skinner & Eddy Corporation* v. *United States*, 249 U. S. 557, 562.

The mere fact that the order of the Commission dismisses the complaint of shippers against rule 4 does not make it a negative order. That rule, promulgated during federal control, was continued in effect upon the recommendation of the Commission until it decided, June 21, 1921, that the rule was unduly prejudicial to joint mines and unduly preferential of local mines, and that the carriers should distribute cars to joint mines on the basis of the 150 per cent. rule. The Commission refrained from making an order that the rule be filed as a tariff schedule, but announced that it expected the carriers

promptly to amend their car service rules to conform with its findings. Accordingly, the carrier ceased to apply rule 4 and applied the 150 per cent. rule in its place. When the case was reopened before the Commission, the contest was between the operators of local mines attacking the 150 per cent. rule and the operators of joint mines supporting that rule and objecting to rule 4. The Commission reversed its former findings and decided in favor of rule 4 and dismissed the complaints assailing that rule. The order expressly includes the findings and conclusions stated in the report. It is not merely negative. Clearly, the order permits and authorizes the carriers to apply rule 4. If that rule is illegal, as alleged, such permission and authority will not sustain it, and suit will lie to set it aside. *The Chicago Junction Case, supra.* Plainly it was the intention and purpose of the Commission that rule 4 should be applied in place of the 150 per cent. rule. The effect of the order is to grant the relief sought by the operators of local mines. We hold that the District Court had jurisdiction.

2. Appellees contend that each operator of a joint mine has a legal right to its fair share of the car supply of each carrier serving the mine; that the operator on any day may offer the prospective output of the mine to any carrier serving it and is entitled on that basis to its share of the carrier's available cars, and that, if any portion of the output remains, the operator may offer it to the second carrier and is entitled to a fair share of that carrier's available cars. This practice is forbidden by rule 4, approved by the order of the Commission. The court below held the order invalid as discriminatory in that it deprived the operator of a joint mine of an advantage to which it has a legal right.

The Interstate Commerce Act confers power on the Commission to regulate the distribution of cars. See § 1, (3), (4), (6), (10), (11), (12), (14); § 3 (1); § 15 (1).

And its jurisdiction over the subject is exclusive. *Interstate Commerce Commission* v. *Illinois Central R. R. Co., supra,* 472; *Baltimore & Ohio R. R. Co.* v. *Pitcairn Coal Co.,* 215 U. S. 481, 493; *Morrisdale Coal Co.* v. *Pennsylvania R. R. Co.,* 230 U. S. 304, 313; *Pennsylvania R. R. Co.* v. *Puritan Coal Co.,* 237 U. S. 121, 131, 133; *Pennsylvania R. R. Co.* v. *Clark Coal Co.,* 238 U. S. 456, 468; *Pennsylvania R. R. Co.* v. *Stineman Coal Co.,* 242 U. S. 298, 300. The courts will not review determinations of the Commission made within the scope of its powers or substitute their judgment for its findings and conclusions. *Interstate Commerce Commission* v. *Illinois Central R. R. Co., supra,* 470; *Interstate Commerce Commission* v. *Union Pacific R. R. Co., supra,* 547; *Kansas City Southern Ry. Co.* v. *United States, supra,* 456; *United States* v. *Louisville & Nashville R. R. Co.,* 235 U. S. 314, 320; *Manufacturers Ry. Co.* v. *United States, supra,* 488.

Under rule 4, an operator of a local mine is entitled on the basis of its daily rating to its pro rata share of the available cars of the carrier serving it. An operator of a joint mine is not confined to any one carrier serving it. It may order from each carrier, but the total number of cars ordered may not exceed the gross daily rating of the mine. It may select the carrier which at the time has the better car supply and receive its pro rata share of that supply according to its gross daily rating, based on its capacity to ship by all carriers. It may choose between the carriers to secure the service, connections and markets it desires to have. The determination of the Commission in favor of rule 4 cannot be said to be so arbitrary or unreasonable as to transcend the power conferred upon it in respect to car distribution. The contention that the order of the Commission deprives operators of joint mines of their property without due process of law is without merit.

Decree reversed.

MR. JUSTICE McKENNA, dissenting.

Let me state the proposition of the opinion denuded of the confusion of its words. It is that the owner of property—a "joint mine," to use the designation of the case—having available to him the car facilities of two carriers, must yield his advantage or some of it to the owner of a "local mine" (to use the designation of the case) who is not so situated.

I am unable to assent and yet I hesitate to dissent,—certainly hesitate to do so by unsupported declaration. I am, however, puzzled to go beyond declaration. Exposition seems to be that of demonstrating the certainty and self-evidence of an axiom. The doctrine of the opinion is that the Interstate Commerce Commission, and this Court in sustaining it, can take from property an attribute, almost as tangible an attribute as its physical substance—that is, its position, that which avails and makes wealth of its products. This, in my opinion, is a deprivation of property. I repeat, to have it intimately in our attention and estimation, that the doctrine of the opinion is that the owner of a "joint mine" may not avail of the cars accessible to his situation—cars of two carriers—only in a degree—he must yield in other degree the full advantage of his position to the owner of a "local mine" that the latter may have accommodation. And why? Is it the dictate of public interest? And if public interest may so dictate, may it not dictate other constituents and conditions of property,—whatever contributes to its value and is formidable to a competitor?

Position of property is as much a constituent of its value as its composition. A market for its products is as necessary as its products. There must be demand for the products and means of their supply, and both, I repeat, are attributes of property. Indeed, they constitute its value aside from its utility. Take them away or limit